Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LILLIAN SOLOMON, *et al.*,
Petitioners,

v.

RESOLUTION TRUST CORPORATION,
as Receiver for Nassau Savings and
Loan Association, F.A.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the power of the RTC under 12 U.S.C. § 1821(e) to repudiate "any contract or lease" preempts New York's statutory tenancy laws when state law explicitly holds that statutory tenancy obligations are not created by and cannot be altered by any agreement, contract, or lease?

2. Whether the terms "contract" or "lease" in 12 U.S.C. § 1821(e) preempt state housing laws that impose on property owners obligations that are not created by and cannot be altered by any agreement, contract, or lease?

PARTIES

In addition to petitioner Lillian Solomon, Selma Diamond, Ira Kaufman, Peggy Lehman, and Horace Solomon were appellees below and join in this petition. G. Oliver Koppell, Attorney General of the State of New York, Donald Halperin, Commissioner of the Division of Housing and Community Renewal of the State of New York, and the New York State Division of Housing and Community Renewal, were appellees below and are filing their own petition. Lloyd Ribner, as executor of the estate of Muriel Ribner, Susan Solomon Patullo, and Denise Tucker were appellees below and join in the petition of the state officials and agency. Jerome Lederer was an appellee below but is now deceased.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is to be reported at 18 F.3d 111 and is included in the Appendix at pp. 1a-31a. The opinion of the district court that was reversed by the court of appeals is reported at 801 F. Supp. 1152 and is included in the Appendix at pp. 32a-55a.

JURISDICTION

The opinion and judgment of the court of appeals was entered on March 2, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

12 U.S.C. § 1821(e)(1) provides:

> Authority to repudiate contracts. In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease—
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. § 1821(e)(5) provides:

> Leases under which the institution is the lessor. (A) In general. If the conservator or receiver repudiates an unexpired written lease of real property of the insured depository institution under which the institution is the lessor and the lessee is not, as of the date of such repudiation, in default, the lessee under such lease may either—
>
> (i) treat the lease as terminated by such repudiation; or
>
> (ii) remain in possession of the leasehold interest for the balance of the term of the lease unless the lessee defaults under the terms of the lease after the date of such repudiation.
>
> (B) Provisions applicable to lessee remaining in possession. If any lessee under a lease described in subparagraph (A) remains in possession of a leasehold interest pursuant to clause (ii) of such subparagraph—
>
> (i) the lessee—

> (I) shall continue to pay the contractual rent pursuant to the terms of the lease after the date of the repudiation of such lease;
>
> (II) may offset against any rent payment which accrues after the date of the repudiation of the lease, any damages which accrue after such date due to the nonperformance of any obligation of the insured depository institution under the lease after such date; and
>
> (ii) the conservator or receiver shall not be liable to the lessee for any damages arising after such date as a result of the repudiation other than the amount of any offset allowed under clause (i) (II).

Set forth in the Appendix at pp. 56a-64a are pertinent provisions of New York's rent control and rent stabilization laws.

STATEMENT OF THE CASE

This case presents questions of profound practical importance to all residents of rent-controlled housing who, like petitioners, face eviction solely to promote the RTC's overreaching desire for more money. The petition also raises issues of recurring doctrinal significance because of the court of appeals' wholesale rejection of state law requirements based on a strained interpretation of terms in a federal statute that on their face embrace, not reject, state law. Specifically, in the decision below, the court of appeals held that the RTC's power to repudiate a "contract or lease" under 12 U.S.C. § 1821(e), enacted in 1989 by the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), preempts state statutory tenancy laws. The court reached this decision even though New York law is quite clear that a property owner's statutory tenancy obligations are not created by and cannot be altered by any contract, lease, or agreement.

The decision below imperils the homes of the ten percent of Americans who live in rent-controlled housing. Thousands of such units are now owned by the RTC or FDIC as receivers for failed savings and loans. But the practical importance of the decision is hardly limited to rent-controlled tenants. The court below effectively acknowledged that the rationale of its decision applies to obligations to provide essential services imposed by state and local housing codes throughout the country, as well as to the nearly universal implied warranty of habitability.

The court of appeals' decision also creates a series of decisional conflicts that warrant this Court's review. First, the Fifth and Seventh Circuits have held that state law is adopted to define what is a "contract" or "lease" under the provision of the Bankruptcy Code, 11 U.S.C. § 365(a), that is the parallel to 12 U.S.C. § 1821(e)(1). Indeed, presently pending before the Court in *O'Melveny & Myers* v. *FDIC*, *cert. granted*, 114 S. Ct. 543 (1993) (No. 93-489), is the similar issue of the extent to which state law defines the "rights . . . of the insured depository institution," and thus of the RTC and FDIC as receiver, under 12 U.S.C. § 1821(d)(2)(A)(i), a provision of FIRREA that is closely related to Section 1821(e)(1). As explained *infra*, at pp. 19-22, at a minimum, the petition for certiorari in this case should be held pending this Court's decision in *O'Melveny*.

Second, the First and Fifth Circuits have held that the word "agreement" under 12 U.S.C. § 1823(e), another related provision of FIRREA, does not include obligations imposed by state law on parties to a contract. Third, in similar fashion, the Seventh and District of Columbia Circuits have specifically held that the terms "contract" or "lease" in 11 U.S.C. § 365(a) do not include obligations imposed by state or local rent control or housing laws. This Court's review is warranted to resolve the conflicts and decide the important issues presented by this case.

A. Factual Background

1. *Petitioners*: The five petitioners are each tenants in rent-controlled or rent-stabilized apartments in 444 East 57th Street, a 45-unit apartment building (the "Building"). For the convenience of the Court, petitioners will focus on Lillian Solomon, whose legal interests are typical of the other petitioners.[1]

Mrs. Solomon has resided in apartment 13F of the Building since 1962. Since before her initial occupancy, apartment 13F has been rent-controlled under New York law. Mrs. Solomon is now over 90 years old and has experienced health problems. In accord with New York rent control law, Mrs. Solomon has no written lease. Rather, as explained *infra*, at pp. 7-9, 20-22, Mrs. Solomon's rights as a rent-controlled tenant are provided for by state statute and regulation.

In 1983, the owner of the Building converted the apartments to cooperative ownership. Pursuant to New York's Martin Act, see N.Y. Gen. Bus. Law §§ 352-e and 352-eeee, Mrs. Solomon had two options. First, she could purchase her apartment as a current tenant at a so-called "insider" price. Under New York law, this price must be lower than the price offered to non-tenant purchasers. In the case of Mrs. Solomon, the reduced tenant price was approximately 59% less than the price offered to non-tenants. R. 364.[2] Mrs. Solomon's second option, provided to her by New York statute and regulation, was to stay in her apartment for as long as she paid the rent-controlled rent. Pursuant to the requirements of New York law, the owner of the Building supplied Mrs.

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[1] Lillian Solomon and Horace Solomon are rent-controlled tenants. The remaining petitioners are rent-stabilized tenants. No party or court in this case has ever suggested that any issue herein turns on whether the tenancy is rent-controlled or rent-stabilized.

[2] References to R. are references to the Joint Appendix filed in the Second Circuit.

Solomon with written offering disclosures that advised her of her two options as guaranteed by New York law.

In view of Mrs. Solomon's advanced age, it is not surprising that she chose to continue to rent her apartment rather than purchase it. Because of the requirements of New York law, her quite reasonable expectation was that she would remain as a tenant and not be evicted from her family home for the remainder of her years so long as she paid her rent-controlled rent. Indeed, Mrs. Solomon testified via affidavit: "At the time I made [my] decision I relied on the representation that my rights as a protected tenant would remain undisturbed and would be unaffected by the change in the nature of the building from a rental to a condominium." R. 343.

Following her decision in 1983, however, a series of events beyond Mrs. Solomon's control led to the decision below. In 1984, the owner of the Building pledged Mrs. Solomon's apartment, along with nine others whose tenants had chosen not to purchase, as collateral for a $3.2 million loan from Nassau Federal Savings and Loan Association ("Nassau S&L"). It is by now familiar that in the mid and late 1980s, real estate values in many parts of the country fell sharply, including the values of New York City apartment buildings. The owner of the Building defaulted in July 1987 on the remaining loan balance of $3,035,711.[3] Nassau S&L purchased the apartments at a foreclosure sale in March 1989, using the loan deficiency as its bid. Under New York law, Nassau S&L succeeded to the owner's rent-control and rent-stabilization obligations concerning the apartments of Mrs. Solomon and the other petitioners.

RTC was appointed receiver for Nassau S&L in 1990. RTC quickly learned that the apartments that Nassau S&L owned in the Building had been appraised at

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[3] One apartment had been released from Nassau S&L's mortgage for payment of $164,229. R. 217.

$2,837,400 as subject to the existing statutory tenancies. R. 233. Sale at that price would have resulted in the recording of a modest loss on the receiver's books. But RTC also learned that the apartments had been appraised at $7,565,000 as vacant and thus, if it could evict Mrs. Solomon and the other statutory tenants, it could receive a substantial profit. *Id.* RTC was also aware that it owned, or would likely come to own, approximately 2200 rent-controlled or rent-stabilized apartments in the New York and New Jersey region, as well as other similar housing units in other regions, including 1000 units in the Atlanta region alone. R. 270, 272, 276.[4]

RTC's Board of Directors determined to bring this case as a "precedent setting" vehicle to establish that "FIRREA empowers RTC to preempt state law in the area of rent control and rent stabilization." R. 269. RTC's Board of Directors chose this case as its "precedent setting" vehicle, notwithstanding that it was informed by RTC officials that "several of the tenants are in their 80's, and at least one is known to be in failing health." *Id.* RTC sent written notice to Mrs. Solomon of its "repudiation and disaffirmance of your lease of the Apartment." R. 251. RTC's notice advised Mrs. Solomon that pursuant to this repudiation she had to vacate her home within 44 days. R. 252.

2. *New York's Rent Control And Rent Stabilization Laws:* New York has had some form of rent control continuously since 1942, when rent control was imposed by federal statute during World War II. See Emergency Price Control Act of 1942, 56 Stat. 23. In 1946, New York state law imposed rent regulation in the form of rent control.

Under the rent control statute and regulations, the rental amount is set and reset biennially pursuant to reg-

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[4] These numbers are for RTC only and do not include similar apartments owned by FDIC as receiver. 12 U.S.C. § 1821(e) applies to both FDIC and RTC receivers.

ulatory guidelines and the tenant has a statutory entitlement to remain in the apartment so long as the statutory rent is paid. N.Y. Unconsol. L. § 8585.1 (McKinney 1987); accord N.Y. City Rent Control Law, N.Y.C. Admin. Code § 26-408.a, codified after N.Y. Unconsol. L. § 8617 (McKinney 1987); N.Y. City Rent and Eviction Regulations § 2204.1, codified after N.Y. Unconsol. L. § 8597 (McKinney 1987). These statutory and regulatory provisions expressly state that the obligations apply to any person who owns the property and to any "tenant . . . notwithstanding the fact that the tenant has no lease or that his or her lease, or other rental agreement, has expired or otherwise terminated, notwithstanding any contract, lease agreement, or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto." *E.g.*, N.Y. City Rent Control Law § 26-408.a; see also, *e.g.*, N.Y. Unconsol. L. § 8585.1. Under rent control, it is illegal, "regardless of any contract, lease or other obligation . . . for *any person* to demand or receive any rent . . . in excess of the maximum rent." *Id.* (emphasis added).

New York's rent stabilization laws were initially adopted in 1969. The nature of the obligaitons they impose is identical in substance to that of rent control. The rent is set biennially by regulatory guidelines and a tenant may not be evicted "[a]s long as the tenant continues to pay" the regulatorily-set rent. N.Y. City Rent Stabilization Code, N.Y. Comp. Codes R. & Regs. § 2524.1(a), codified after N.Y. Unconsol. L. § 8634 (McKinney 1987). By their terms, New York's rent stabilization laws apply to "owner[s]" and "tenant[s]," not to lessors and lessees. *E.g.*, N.Y. City Rent Stabilization Law, N.Y.C. Admin. Code §§ 26-511.c, codified after N.Y. Unconsol. L. § 8617 (McKinney 1987). The rent stabilization laws use the administrative device of a renewal lease as a trigger for the owner's right to charge the increased rent set by regulatory guidelines. The owner, however, is

legally obligated to provide the renewal lease. See N.Y. City Rent Stabilization Law § 26-511.c(9) ("an owner shall not refuse to renew a lease"). If no renewal lease is provided, by law the tenant remains in the property at the old rental rate and continues to be protected from eviction. See N.Y. City Rent Stabilization Code § 2522.5(b)(2).

B. The Proceedings Below

In February 1991, the RTC brought this action seeking a declaration that it could evict Mrs. Solomon and the other petitioners without complying with New York's statutory tenancy laws. The district court described the issue presented by this case as whether RTC's power under 12 U.S.C. § 1821(e) to repudiate "any contract or lease . . . to which [Nassau S&L] is a party" preempted the obligations imposed by New York's statutory tenancy laws. See App. 39a.

The district court undertook a two-step inquiry. First, the district court examined the nature of statutory tenancy obligations under state law. The district court determined that under both the plain meaning of New York's statutory and regulatory provisions, as well as a number of express decisions of New York courts, the obligations imposed by New York's statutory tenancy laws were a matter of legislative compulsion, not a matter of any obligation created by or pursuant to a contract or lease. *Id.* at 40a-44a. Second, the court held that Section 1821(e) could not properly be "interpreted broadly to include non-lease statutory rights of occupancy" that were not created as an obligation of a contract or lease under state law. *Id.* at 46a-48a. The court concluded that "[t]he RTC cannot enlarge its powers under FIRREA by arguing that Congress' objectives for it were broader than the powers granted by statute." *Id.* at 53a. Accordingly, the district court granted summary judgment for petitioners.

The court of appeals reversed. First, the court held that it was error for the district court to hold that application of Section 1821(e)(1) is controlled by whether petitioner's rights as a statutory tenant were a matter of contract or lease under state law. Instead, the court of appeals held that "the definition of the phrase 'contract or lease' is a matter of federal law." *Id.* at 13a.

Second, the court constructed for Section 1821(e) an interpretation that was explicitly designed "to strengthen RTC's hand in remedying a national economic emergency." *Id.* at 23a. Under this concededly expansive approach, the court held that the statutory rights created by New York's rent control and rent stabilization laws fell within the term "contract or lease" in Section 1821(e) because such rights were "lease-based" or "contract-based." *Id.* at 15a, 20a. The court effectively acknowledged that its reasoning allows RTC and FDIC to repudiate a broad range of state law requirements applicable to landlords, including statutory requirements that landlords provide certain "services" (*id.* at 16a), as well as the "warranty of habitability" that "virtually all states read . . . into residential lease-contracts" (*id.* at 14a).

After holding that a statutory tenancy constituted a "lease" under 12 U.S.C. § 1821(e)(1), the court also rejected an alternative ground for affirmance. Under 12 U.S.C. § 1821(e)(5), a lessee of real property must be allowed to "remain in possession of the leasehold interest for the balance of the term of the lease." Petitioners argued that if a statutory tenancy were construed to be a "lease" under Section 1821(e)(1), then a statutory tenant must be allowed to remain in possession under Section 1821(e)(5) for the "balance of the term of the [statutory tenancy]." The court held that it could not use the term of the "statutory occupancy rights to delimit the leasehold for FIRREA purposes." App. 25a. Accordingly, the court held that "the power of repudiation under section 1821(e) was conferred in aid of an acute financial emergency, and cannot be considered fairly to accom-

modate so prolonged a residual tenancy." *Id.* The Court held that "for purposes of § 1821(e)," the term of the "lease" created by a statutory tenancy is "divide[d] . . . into periods" that ended, in this case, "on the biennial January 1 date on which the landlord next became entitled (following the notice of the repudiation) to a review of the maximum base rent." *Id.* at 26a. Because RTC sent its repudiation notices to petitioners more than two years ago, the decision of the court of appeals would allow the immediate eviction of Mrs. Solomon and the other petitioners.[5]

REASONS FOR GRANTING THE PETITION

I.

This is a case of both great practical and legal importance. As is more fully developed *infra*, at pp. 14-28, four principal factors demonstrate the importance of this case:

• As this Court recently stated, "rent control statutes regulat[e] housing throughout the country." *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1528 (1992). Approximately ten percent of all rental housing (2.8 million units) in the United States is covered by rent control. See U.S. Department of Housing and Urban Development Office of Policy Development and Research, *Report to Congress on Rent Control* 1 (Sept. 1991). In addition, numerous States control the renting of space by mobile home parks to mobile home owners. See, *e.g.*, *Yee*, *supra*. Moreover, a number of States regulate the rent charged by railroads to tenants on properties adjacent to the railroads' rights-of-way. See, *e.g.*, *In re Chicago, R. I. & Pac. R.R.*, 772 F.2d 299 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986).

The failure of hundreds of savings and loans has brought many rent-controlled properties under the own-

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[5] On April 4, 1994, the court of appeals stayed its decision pending this Court's resolution of the petitions for certiorari in this case.

ership of RTC and FDIC receivers. RTC's Board of Directors chose to bring this case as a "precedent setting" vehicle to establish that "FIRREA empowers RTC to preempt state law in the area of rent control and rent stabilization." R. 269. Press reports indicate that the RTC is already moving to use the decision below in support of its efforts to preempt rent control laws and evict tenants in Massachusetts, California, and Connecticut. See "2nd Circuit Adds to Agency Power," *The Thrift Regulator*, Mar. 14, 1994, at 3.

The record in this case reveals that RTC owns approximately 2200 rent-controlled housing units in the New York-New Jersey region, and another, for example, 1000 such units in the Atlanta region alone. See *supra*, at p. 7. The FDIC as receiver of other failed savings and loans obviously also owns a substantial additional number of such housing units. Because the decision at issue in this case is intended by the RTC to set a "precedent" affecting thousands of rent-controlled tenants in various parts of the country, that decision warrants review by this Court, even without regard to the conflicts with other decisions described below.

• Moreover, the effect of the decision below is not limited to rent control laws. The decision below has a breathtaking scope. The court of appeals effectively acknowledged that its rationale would preempt the essential "services" obligations imposed by state and local housing codes in every state. App. 16a. Indeed, the court similarly acknowledged that its rationale would preempt "the warranty of habitability" that "virtually all states . . . read into residential lease-contracts." *Id.* at 14a.

• This Court properly exercises its certiorari jurisdiction to resolve conflicting circuit court interpretations of "related" or "similar," albeit not identical, statutory provisions. *Begier* v. *IRS*, 496 U.S. 53, 57 n.2 (1990). This case presents three such conflicts. Indeed, the decision below is contrary to decisions of four other circuit

courts. First, the word "agreement" in 12 U.S.C. § 1823(e), another FIRREA provision, has been held not to include obligations imposed by state law on parties to a relationship initiated by contract. See *Bateman* v. *FDIC*, 970 F.2d 924, 928 (1st Cir. 1992); *Patterson* v. *FDIC*, 918 F.2d 540, 543-45 (5th Cir. 1992). The decision below creates a conflict by holding that the functionally indistinguishable words "contract" or "lease" in 12 U.S.C. § 1821(e) do encompass obligations imposed by state statute.

Moreover, the same words, "contract" or "lease," are used in the provision of the Bankruptcy Code, 11 U.S.C. § 365(a), that authorizes bankruptcy trustees to repudiate contracts and leases. Circuit courts have held that state law should be adopted to determine what legal interests fall within "contract" or "lease" under § 365(a) of the Bankruptcy Code. See *In re Topco, Inc.*, 894 F.2d 727, 739 n.17 (5th Cir. 1990); *In re Streets & Beard Farm Partnership*, 882 F.2d 233, 235 (7th Cir. 1989). They have also specifically held that obligations imposed by state and local rent control and housing laws are not obligations created by "contract" or "lease" under the Bankruptcy Code. See *In re Chicago, R. I. & Pac. R.R.*, 772 F.2d at 302-03; *Saravia* v. *1736 18th St., N.W., Ltd. Partnership*, 844 F.2d 823, 827 (D.C. Cir. 1988). In conflict with these decisions, the court below created a federal law definition for "contract" or "lease" that includes statutory tenancies.

• The decision below also conflicts with prior decisions of this Court. First, this Court has held that when a federal statute uses a term "deeply rooted in state traditions, customs, habits, and laws," *RFC* v. *Beaver County*, 328 U.S. 204, 210 (1946), state law should be adopted to define the term. Plainly "contract" and "lease" are such terms.

Indeed, presently before the Court is the issue of whether "rights . . . *of the insured depository institution*"

under another FIRREA provision, 12 U.S.C. § 1821 (d)(2)(A)(i) (emphasis added), means "rights" under state law. See *O'Melveny & Myers* v. *FDIC*, *cert. granted*, 114 S. Ct. 543 (1993) (No. 93-489). If state law is held applicable in *O'Melveny*, at a minimum, the petition in this case should be granted, the decision below vacated, and the case remanded for reconsideration in light of *O'Melveny* of whether state law should be adopted to define under 12 U.S.C. § 1821(e)(1) whether an interest or obligation is created by a "contract or lease . . . *to which such institution is a party*." (Emphasis added.) See *infra*, at pp. 19-20.

Even if federal law defines what is a "contract or lease" under 12 U.S.C. § 1821(e), the decision below is in conflict with decisions of this Court. In both preemption and Contract Clause cases, the Court has drawn a clear distinction between obligations imposed by state law and obligations imposed by contract. See *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2622 & n.24 (1992) (plurality opinion), *id.* at 2627-31 (Blackmun, J., joined by Kennedy and Souter, JJ., concurring in result in pertinent part); *General Motors Corp.* v. *Romein*, 112 S. Ct. 1105, 1109-11 (1992). The decision below entirely collapses this distinction.[6]

II.

This Court has repeatedly held that rent control is "a legitimate exercise of . . . police powers." *Pennell* v. *City*

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[6] The importance of the decision below is reflected in the wide reporting it has received in the legal, thrift and banking, real estate, and general press. *See, e.g., U.S. Law Week*, 62 U.S.L.W. 2566 (Mar. 22, 1994); "2nd Circuit Adds to Agency Power," *The Thrift Regulator*, Mar. 14, 1994, at 3; "Court Rules RTC Can Evict Tenants," *Real Estate Weekly*, Mar. 9, 1994, at 1; "Resolution Trust Wins Rent-Control Case In New York," *Wall St. J.*, Mar. 3, 1994, at B9.

of San Jose, 485 U.S. 1, 12 & n.6 (1988).[7] The Court has also repeatedly held that "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the states [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone*, 112 S. Ct. at 2617 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The court of appeals simply ignored this cornerstone of this Court's jurisprudence—never even attempting to show a "clear and manifest purpose" of Congress to preempt state rent control and other housing laws.

There are at least two reasonable interpretations of 12 U.S.C. § 1821(e) under which statutory tenancies are not preempted. First, an obligation imposed by state law on a landlord should not be considered an obligation created by "contract or lease" under Section 1823(e) where, as here, state law expressly provides that the obligation is not created by a contract or lease, and indeed applies notwithstanding a contrary contract or lease. See *infra*, at pp. 16-20. Second, even if federal law were used to determine what constitutes an obligation created by "contract or lease," the plain meaning of those words is that an obligation imposed by state law is not an obligation created by contract or lease. See *infra*, at pp. 23-28.

A.

1. The general rule enacted by FIRREA is that RTC as receiver succeeds to the rights and obligations of the failed savings and loan. See 12 U.S.C. § 1821(d)(2)(A)(i), 1821(d)(2)(H).[8] Section 1821(e) provides a limited exception to that general rule, allowing RTC to

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[7] *Accord, e.g.*, *FCC* v. *Florida Power Co.*, 480 U.S. 245, 252 (1987); *Bowles* v. *Willingham*, 321 U.S. 503, 517-18 (1944); *Block* v. *Hirsh*, 256 U.S. 135, 155-57 (1921).

[8] RTC as receiver has the same rights and obligations as FDIC as receiver. 12 U.S.C. § 1441a(b)(4).

"repudiate any contract or lease . . . to which such institution is a party." *Id.* § 1821(e)(1).

This Court has held that when a statute uses a term that is "deeply rooted in state traditions, customs, habits, and laws," the courts should adopt the applicable state law to define that term. *RFC* v. *Beaver County*, 328 U.S. 204, 210 (1946). The Court has thus used applicable state law to define the statutory terms "real property," *id.*, "property and rights to property," *United States* v. *Brosnan*, 363 U.S. 237, 240-42 (1960), and "children," *De Sylva* v. *Ballentine*, 351 U.S. 570, 580-81 (1956). The Court has also adopted state law to "fill the interstices" of a federal statute regulating corporate activities, *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98, 101-08 (1991), and for "the determination of property rights in the assets of a bankrupt's estate," *Butner* v. *United States*, 440 U.S. 40, 54 (1979).[9] The Court has emphasized that the reasons for adopting state law to define terms or fill interstices in federal statutes are "particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen*, 500 U.S. at 98; accord *Brosnan*, 363 U.S. at 242.

The decision of the court of appeals to create a federal law definition for what constitutes a "contract or lease . . . to which such institution is a party" under 12 U.S.C. § 1821(e) is in stark conflict with these prior decisions.[10]

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[9] As *Butner* explained, "[t]he justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests, *including the interest of a mortgagee in rents earned by mortgaged property.*" 440 U.S. at 55 (emphasis added). Of course, RTC is the successor to Nassau S&L, the mortgagee of petitioners' apartments.

[10] The district court had applied state law to determine whether a statutory tenancy was a "contract or lease" under Section 1821(e), and petitioners also argued to the court of appeals for application of state law. *See* Brief of Appellees at 21 & n.28. The

First, the words "contract or lease" are quintessentially "deeply rooted in state traditions, customs, habits, and laws." *RFC* v. *Beaver County*, 328 U.S. at 210. Second, there can be no doubt that Mrs. Solomon and the other petitioners, as well as thousands of other tenants who have state statutory rights of some kind, have relied on their state-law created rights. Here, in particular, Mrs. Solomon relied on her state-law rights as a tenant in forgoing an option to purchase her apartment at a reduced price. See *supra*, at pp. 5-6. Because she did not purchase, instead relying on her state law rights, RTC now is in a position to try to evict her from her family home of 35 years. Third, FIRREA contains numerous express federal definitions of a variety of statutory terms. See, *e.g.*, 12 U.S.C. § 1813. Where Congress desired to have a federal definition of a term, it did so expressly. It did not provide such a defintion for "contract or lease" in Section 1821(e).

2. Moreover, the use of federal law to define "contract or lease" in Section 1821(e) is in conflict with numerous decisions using state law to define the exact same words in 11 U.S.C. § 365(a), which allows a bankruptcy trustee to repudiate "any executory contract or unexpired lease of the debtor." The court of appeals conceded that Congress in part modelled 12 U.S.C. § 1821(e) on 11 U.S.C. § 365. See App. 22a (citing S. Rep. No. 19, 101st Cong. 1st Sess. 314 (1989)). But, in conflict with the decision of the court of appeals in this case, other courts of appeals have held that state

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court of appeals miscited two cases in support of creating a federal definition. Each of the cases cited involved nothing more than application of lengthy, express definitions found in the federal statute itself. *See Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 558 (1990) (applying 27-word definitions of "debt" and "claim" in 11 U.S.C. §§ 101(4)(A) and 101(11) (1988)); *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 430 (1986) (applying over 100-word definition of "deposit" in 12 U.S.C. § 1813(*l*)(1) (1982)). No provision in FIRREA defines "contract or lease."

law determines the existence and extent of lease obligations or contract obligations under 11 U.S.C. § 365. *In re Topco, Inc.*, 894 F.2d 727, 739 n.17 (5th Cir. 1990) ("state law determines whether these contracts constitute unexpired leases subject to Section 365"); *In re Streets & Beard Farm Partnership*, 882 F.2d 233, 235 (7th Cir. 1989) ("[i]n determining the significance of the remaining obligations under a contract we look to relevant state law").[11]

It would be absurd for state law to control whether a particular arrangement is a "contract" or a "lease" in bankruptcy proceedings under 11 U.S.C. § 365, but for a federal definition to govern whether the exact same arrangement is a "contract" or a "lease" in receivership proceedings under 12 U.S.C. § 1821(e)(1). *Cf.* Brief for the FDIC, at 26, in *O'Melveny & Myers* v. *FDIC*, No. 93-489 (Government concedes that bankruptcy trus-

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[11] *Accord, e.g., In re Mahoney*, 153 B.R. 174, 176 (E.D. Mich. 1992); *In re Frederick Petroleum Corp.*, 98 B.R. 762, 763 (S.D. Ohio 1989); *In re Powers*, 43 B.R. 112, 114 (E.D. Mo. 1984); *In re Huff*, 81 B.R. 531, 534 (Bankr. D. Minn. 1988); *In re Bertelsen*, 65 B.R. 654, 657 (Bankr. C.D. Ill. 1986); *In re Mesa Refining Inc.*, 52 B.R. 359, 362 (Bankr. D. Colo. 1985). Indeed, under 11 U.S.C. § 365(a), state law has been used to determine that a New York statutory tenancy is not a "contract" or a "lease." *In re Friarton Estates Corp.*, 65 B.R. 586, 592-93 (Bankr. S.D.N.Y. 1986).

The court of appeals did nothing to attempt to reconcile its decision with interpretations in other decisions of Section 365(a) of the Bankruptcy Code. Instead, the court referred to an inapposite provision of the Bankruptcy Code, 11 U.S.C. § 365(h)(1), which provides that the enforceability of a "renewal or extension" of a lease is governed by "applicability nonbankruptcy law." *See* App. 22a. Nothing in the Bankruptcy Code, however, expressly refers to "nonbankruptcy law" as the basis for defining what is a "contract" or "lease" under Section 365(a). Courts have found that such reference to state law is inherent in Section 365(a), and the functional language of Section 365(a) is indistinguishable from 12 U.S.C. § 1821(e)(1). *Compare* 11 U.S.C. § 365(a) ("contract . . . or . . . lease of the debtor") *with* 12 U.S.C. § 1821(e)(1) ("contract or lease . . . to which such institution is a party").

tees are "comparable" to FDIC and RTC receivers). But the decision below creates precisely that conflict. This conflict between circuit decisions on related and similar statutory provisions is a proper ground for certiorari under *Begier* v. *IRS*, 496 U.S. 53, 57 n.2. (1990).

3. The decision below may well conflict with the forthcoming opinion in *O'Melveny & Myers* v. *FDIC*, No. 93-489. At issue in *O'Melveny* is the interpretation of 12 U.S.C. § 1821(d)(2)(A)(i), which provides that the receiver, FDIC or RTC, "succeed[s] to . . . all rights . . . of the insured depository institution." O'Melveny contends that because state law governs the assertion of tort claims and other "rights" by the savings and loan,[12] pursuant to the plain language of Section 1821(d)(2)(A)(i), state law also governs the assertion of these "rights" by the FDIC or RTC. *Cf. Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 585 (1989) ("state law" governs assertion of obligations against FSLIC as successor to savings and loan). Thus, according to O'Melveny, for the RTC or the FDIC to show that it has an enforceable "right" (*i.e.*, tort claim), the RTC or the FDIC must show that the savings and loan itself had an enforceable "right" under governing state law.

Section 1821(e)(1) employs a structure parallel to that of Section 1821(d)(2)(A)(i). Section 1821(d)(2)(A)(i) says that RTC may assert not simply rights, but rather the "rights . . . of the insured depository institution." Similarly, Section 1821(e)(1) says that RTC may repudiate not simply "any contract or lease," but rather "any contract or lease . . . to which such institution is a party." Just as state law should be dispositive in *O'Melveny* because the issue there is the scope of the "rights . . . *of the insured depository institution*," so too here state law should be dispositive because the issue in this case is whether obligations were created "by any

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[12] *See Bank of Am. Nat'l Trust & Sav. Ass'n* v. *Parnell*, 352 U.S. 29, 33-34 (1956).

contract or lease . . . *to which such institution is a party*." Whether the savings and loan itself had contract or lease obligations is plainly a question on which state law must control.

The Government has informed this Court that because of the broad potential implications of the forthcoming *O'Melveny* decision, savings and loan cases involving issues related but not identical to those in *O'Melveny* should be held for *O'Melveny*, with an eye towards possibly granting those cases, vacating them, and remanding them for reconsideration in light of *O'Melveny*. See Petition for a Writ of Certiorari, *FDIC* v. *Dawson*, No. 93-1486; Petition for a Writ of Certiorari, *FDIC* v. *Cocke*, No. 93-1485. The Government has properly stated that the standard for holding a petition is whether "it is possible that this Court's disposition of *O'Melveny & Myers* v. *FDIC* . . . will shed light on the proper analysis to be used in deciding this case." *Dawson* Petition at 6. There is no doubt that this case satisfies the standard set forth by the Government.

As demonstrated *supra*, at pp. 18-19, *O'Melveny* could well interpret FIRREA in a way that supports application of state law to determine what is a "contract or lease" under Section 1821(e). Here, as the district court held, under New York law, the rights of statutory tenants are not created by contract or lease. To the contrary, as the plain meaning of the pertinent statutory provisions indicates, tenants' statutory rights apply even if (a) there is no existing contract or lease or (b) there is a contract or lease that purports to limit or negate the statutory rights. See *supra*, at pp. 8-9.

New York courts have long held that the occupancy rights of statutory tenants are not created by contract or lease. In *Whitmarsh* v. *Farnell*, 83 N.E.2d 543 (N.Y. 1949), the New York Court of Appeals held that a tenant's

> occupancy of the apartment after his lease expired *was not under any agreement express or implied* but by virtue of a compulsion exerted on the landlord by the local emergency rent law which allowed him to remain in possession.

Id. at 547 (emphasis added). See also *De Santis* v. *White Rose Assocs.*, 578 N.Y.S.2d 363, 367 (N.Y. Sup. Ct. 1991) ("the occupants remain in possession *not pursuant to any agreement* with the owner but *solely* by virtue of the emergency rent laws") (emphasis added); *Stern* v. *Equitable Trust Co.*, 144 N.E. 578, 578 (N.Y. 1924) (a statutory tenant "remains in possession, *not by virtue of any agreement, express or implied*, either as to duration of term or amount of rent, *but by virtue of the compulsion which the law exerts* on the landlord to allow him to remain") (emphasis added).[13]

Adoption of New York law would also require reversal of the decision below under 12 U.S.C. § 1821(e)(5). If a statutory tenancy is considered a "lease", New York law defines the term of that tenancy as "*so long as he or she* [*the tenant*] *continues to pay the rent.*" N.Y. City Rent Control Law § 26-408.a; see *130 West 57 Corp.* v. *Hyman*, 66 N.Y.S.2d 332, 334 (N.Y. App. Div. 1946)

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[13] Such holdings fully apply to New York's rent stabilization laws, in addition to New York's rent control laws. *Park Summit Realty Corp.* v. *Frank*, 434 N.Y.S.2d 73 (N.Y. App. Div. 1980), *aff'd*, 448 N.Y.S.2d 414 (N.Y. App. Div. 1981), *aff'd*, 439 N.E.2d 358 (N.Y. 1982), squarely holds that the rent stabilization laws do not create a form of tenancy by agreement:

> The legal theory underlying the notion of a periodic tenancy is that of an implied agreement . . . . Under no view, however, can a lessee who remains in possession at the end of his lease by virtue of the rent stabilization laws be regarded as a periodic tenant. . . . "[[T]he rent] laws extended against the will of the landlord the right of the tenant to remain in possession of [property] . . . . The tenant thus remains in possession, not by virtue of [an] agreement, express or implied . . . but by virtue of compulsion . . . . The tenant stands on his statutory rights . . . ."

434 N.Y.S.2d at 76-77 (quoting *Stern*, 144 N.E. at 578.)

("So long as a tenant continues to pay the rent to which the landlord is entitled he may not be removed from the premises"). The theory underlying the labored construction adopted by the court of appeals, *i.e.*, that the statutory tenancy must be "divide[d] . . . into periods," App. 26a, has been expressly rejected by the New York courts. "Under no view . . . can a lessee who remains in possession at the end of his lease by virtue of the rent stabilization laws be regarded as a periodic tenant." *Park Summit Realty Corp.* v. *Frank*, 434 N.Y.S.2d at 76; see also *Stern* v. *Equitable Trust Co.*, 144 N.E. at 578 ("The tenant does not, by remaining in possession . . . tender an option to allow him to remain as a tenant for any renewed or definite term").

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In sum, prior decisions of this Court, as well as decisions of other circuit courts interpreting the words "contract" or "lease" in related legislation, call for the application of state law in this case. The decision below cannot be squared with those decisions. Moreover, there is a reasonable likelihood that the application of state law here will be strongly supported by the forthcoming decision in *O'Melveny & Myers* v. *FDIC*, No. 93-489.[14] Accordingly, at a minimum, this petition for certiorari should be held pending the decision in *O'Melveny*, and disposed of as appropriate in light of the Court's decision in that case.

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[14] Were this Court to grant review, set this case for argument, and decide that state law is to be adopted, the Court would have three further options. First, the Court could agree with the district court that petitioner prevails under state law. *See, e.g., Bernhardt* v. *Polygraphic Co. of Am.*, 350 U.S. 198, 205 (1956); *West* v. *AT&T*, 311 U.S. 223, 238-39 (1940). Second, the Court could remand the state law issue. *See Miree* v. *DeKalb County*, 433 U.S. 25, 33 (1977). Third, this Court or the court below could certify the state law issue to the New York Court of Appeals. *See*, N.Y. Const. art. VI, § 3(9).

B.

Even if federal law were to supply its own definition of "contract or lease" in 12 U.S.C. § 1821(e)(1), the decision of the court of appeals would also merit this Court's review. The court of appeals proffered an interpretation of "contract or lease" that is contrary to the plain meaning of the statute and in conflict with prior decisions of both this Court and a number of courts of appeals.

1. The court of appeals treated "contract or lease" in Section 1821(e)(1) as if each were a relatively new word in our legal lexicon. Of course, these terms are not new. These words have settled meaning acquired over many years of legal interpretation, and it is this received understanding which Congress is "presumed" to have adopted. *E.g., Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989).

Black's Law Dictionary defines "contract" as "[a]n *agreement* between two or more persons which creates an obligation to do or not to do a particular thing." *Black's Law Dictionary*, 291-92 (5th ed. 1979) (emphasis added). Similarly, a "lease" is defined as "[a]ny *agreement* which gives rise to relationship of landlord and tenant (real property) or lessor and lessee (real or personal property). . . . *Contract* for exclusive possession of lands or tenements for determinate period." *Id.* at 800 (emphasis added). It is thus black letter law that a "contract" or "lease" obligation is one created by agreement. The obligations imposed by New York's statutory tenancy laws are obviously not created by any agreement. To the contrary, New York's statutory tenancy obligations exist even if there is no agreement, or if there is a contrary agreement. See *supra*, at pp. 8-9, 20-21. To define these statutory obligations as obligations created by "contract or lease" certainly deprives those words of their natural, indeed plain, meaning.[15] Here, for example, New

[15] Perhaps even more absurd is the court of appeals' decision that a statutory tenancy is a "lease" under 12 U.S.C. § 1821(e)(1)

York's statutory rent control laws allow Mrs. Solomon to retain possession without a written lease. And New York's statutory rent stabilization laws allow other petitioners to remain in possession despite provisions in their written leases that state that the leases have long since expired. See, *e.g.*, R. 362 ("your lease expires on Sept. 30, 1987").

Congress plainly understood the term "contract or lease" in 12 U.S.C. § 1821(e)(1) to encompass only

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but the term of the statutory tenancy is not "the term of the lease" for § 1821(e)(5). This result-driven approach is flatly contrary to "[t]he normal rule of statutory construction [that] assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (internal quotations omitted).

The court of appeals' contradictory constructions of the two paragraphs of § 1821 cannot be defended, as the court of appeals attempted (*see* App. 25a-26a), as necessary to prevent a taking. First, RTC as successor is asserting the rights of Nassau S&L. *See supra*, at pp. 6-7, 19. Nassau S&L acquired a lien on rent-regulated apartments in 1984 and purchased those same apartments at a foreclosure sale in 1989. *See supra*, at p. 6. Both of these transactions occurred long after New York enacted its rent control and rent stabilization laws. The application of a statute to a property interest acquired *after* enactment of the statute simply cannot be a taking. *See, e.g., United States* v. *Security Indus. Bank*, 459 U.S. 70 (1982); *see also Landgraf* v. *USI Film Prods.*, slip op. at 21 (U.S. Apr. 26, 1994) (the Takings Clause is an "antiretroactivity" provision). Second, even if New York's laws were retroactively applied—an unlikely prospect given their longevity—there would be no taking because the initial renting to the tenant is consensual and landlords have opportunities to withdraw properties from the rental market. *See Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1528-29 (1992); *Rent Stabilization Ass'n* v. *Higgins*, 1993 WL 524208, at *6 (N.Y. 1993) ("[a]n owner's right to evict an unsatisfactory tenant or convert rent-regulated property to other uses remains"), *petition for cert. filed*, 62 U.S.L.W. 3659 (U.S. Mar. 21, 1994) (No. 93-1490); *Dawson* v. *Higgins*, 1994 N.Y. App. Div. LEXIS 3295, at *13 (N.Y. App. Div. 1944) ("[t]he rent-control provisions . . . plainly do not require a landlord to remain in the rental market in perpetuity").

obligations created by agreement. Thus, Section 1821 is replete with references to terms from the law of contract that have no meaning when applied to obligations imposed by statute or regulation. See, *e.g.*, § 1821(e)(1)(A) (receiver may "*disaffirm* or *repudiate* any contract or lease"); (emphasis added); *id.* § 1821(e)(1)(B) ("performance"); § 1821(e)(5)(A) ("written lease"; "default"); § 1821(e)(5)(A)(i) ("terminated"); § 1821(e)(5)(A)(ii) ("term of the lease"); § 1821(e)(5)(B)(i)(I) ("the contractual rent"). Section 1821(e) was plainly intended to provide some protection from imprudent agreements of the savings and loan, not from the generally applicable economic and social laws and policies of a given State. When Congress wanted to preempt the obligations or requirements of state law, it did so expressly. See, *e.g.*, 12 U.S.C. §§ 1464(p), 1821(m)(10), 1823(k)(1)(A)(i). It did not do so here.

2. The decision of the court of appeals is also in conflict with decisions of this Court expressly distinguishing obligations imposed by state law from obligations imposed by contract. Two terms ago, in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), the Court interpreted a statutory provision preempting certain "requirement[s] . . . imposed under State law." See *id.* at 2619. A four-justice plurality held that "a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . *imposed under State law.*'" *Id.* at 2622 (emphasis in original); see also *id.* at 2622 n.24 ("common understanding dictates that a contractual requirement, although only enforceable under state law, is not 'imposed' by the state, but rather is 'imposed' by the contracting party on itself"). The three-justice concurrence would have gone even further and held that neither tort nor contract obligations were "imposed under State law." See *id.* at 2627-31. The decision below cannot be reconciled with *Cipollone*.

It is also in conflict with this Court's interpretation of the Contract Clause. In *General Motors Corp.* v. *Romein*,

112 S. Ct. 1105 (1992), the Court held that a state law imposing obligations on employers different from those in their contracts with their employees did not become part of the contract; thus, the state law could later be amended without violating the Contract Clause. *Id.* at 1109-11. The decision below is in obvious conflict with *Romein*. Indeed, the rationale of the Second Circuit has the consequence (presumably unintended) that if New York were to repeal its rent regulation laws, this action would violate the Contract Clause.

The decision below is also in conflict with this Court's takings jurisprudence. Under *Armstrong* v. *United States*, 364 U.S. 40 (1960), when state law creates a property interest and the federal government obliterates that interest for the Government's "own advantage," there is a taking. *Id.* at 48-49. Here, the court below has adopted an interpretation that allows RTC to extinguish petitioners' state law-created tenancy rights for the Government's "own advantage"—an obvious taking under *Armstrong*.[16] This Court has held that federal statutes must be construed to avoid possible takings, see *United States* v. *Security Indus. Bank*, 459 U.S. 70, 76-82 (1982), and the court below ignored this responsibility.

3. The decision of the court below is also in conflict with interpretations of "related" and "similar" statutory provisions by four other circuit courts. *Cf. Begier* v. *IRS*, 496 U.S. at 57 n.2. First, under 12 U.S.C. § 1823(e), a related provision of FIRREA, a person cannot assert an unwritten or unrecorded "agreement" as a claim or defense against the FDIC or the RTC. The FDIC and the RTC have repeatedly asserted that "agreement" under Section 1823(e) encompasses property interests created

[16] *See also Lynch* v. *United States*, 292 U.S. 571, 579-80 (1934) (federal government's repudiation of its own contractual obligation is a taking); *cf. United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 502 (1993) (constitutional scrutiny of deprivation of property increases "where the Government has a direct pecuniary interest in the outcome of the proceeding").

by state law in favor of persons who initially entered into contractual relationships. The Government's interpretation of "agreement" in Section 1823(e) is thus equivalent to its interpretation of "contract" or "lease" in Section 1821(e). The First and Fifth Circuits have rejected this interpretation in the context of Section 1823(e).

Specifically, in *Bateman* v. *FDIC*, 970 F.2d 924, 927-28 (1st Cir. 1992), the court held that a state-law mechanic's lien created in favor of a contractor who did work with the owner's "consent" was not an obligation created by "agreement" under Section 1823(e). Similarly, the court in *Patterson* v. *FDIC*, 918 F.2d 540, 543-45 (5th Cir. 1990), held that a statutory homestead interest given to a property owner is not an interest created by "agreement" under Section 1823(e).[17]

Second, the decision below is also in conflict with two circuit court decisions holding that the words "contract" or "lease" in 11 U.S.C. § 365(a) do not apply to obligations imposed by state rent control or other state housing laws. *In re Chicago, R. I. & Pac. R.R.*, 772 F.2d 299, 302-03 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986), held that a bankruptcy trustee must comply with state rent control laws even *after* a lease is repudiated by

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[17] *See also New Bank* v. *Callahan*, 798 F. Supp. 73, 77 (D.N.H. 1992) (abuse of process claim not based on an "agreement" since "obligation to refrain from abuse of process is one that arises from state law"; "legal obligations [that] are presumed to be part of every contract" do not come within "agreement" under § 1823(e)); *RTC* v. *Ford Mall Assocs.*, 796 F. Supp. 1233, 1239-40 (D. Minn. 1992) ("[m]echanics' liens . . . depend on the operation of state law" and to consider them "agreements" would "effectively eliminate the agreement requirement"); *Bascom Constr., Inc.* v. *FDIC*, 777 F. Supp. 123, 126 (D.N.H. 1991) (mechanic's lien based on state law "does not constitute an 'agreement' [under] 1823(e)"); *Kile* v. *FDIC*, 641 F. Supp. 723, 726 (E.D. Tenn. 1986) (in lien priority dispute involving first-to-record statute, "the Bank did not become subordinate by any agreement, but by operation of state law").

the trustee.[18] In *Saravia* v. *1736 18th St., N.W., Ltd. Partnership*, 884 F.2d 823 (D.C. Cir. 1988), the court held that the words "contract" or "lease" in § 365 did not "implicate public obligations." *Id.* at 827. As a matter of law, the court held, obligations imposed by local housing statutes, such as providing utilities and essential services, are "independent" of private leases. *Id.* The bankruptcy trustee's power to reject a "contract" or "lease" only covered "lease covenants [that] go beyond the requirements of law (for example, providing for a doorman, indoor parking, and the like)." *Id.*

Under the decision below, state statutory rent control and housing obligations, which are not part of the "contract" or "lease" that may be repudiated in bankruptcy proceedings, are part of the "contract or lease" in receivership proceedings. Such an outcome is nonsensical and this decisional conflict warrants this Court's review. The rights of thousands of tenants are too important to be left to the happenstance of which federal judicial circuit they reside in.

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[18] Below, the RTC attempted to distinguish the result in bankruptcy cases based on 28 U.S.C. § 959(b), which provides: "Except as provided in section 1166 of title 11 [railroad reorganizations], a trustee, receiver, or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." 28 U.S.C. § 959(b) cannot be used to distinguish bankruptcy cases for at least two reasons. First, *In re Chicago, R. I. & Pac. R.R.* is a railroad reorganization case to which 28 U.S.C. § 959(b) expressly does not apply. Second, Congress expected that the power of the FDIC and RTC to repudiate contracts would extend no further than that of a receiver in equity. *See* H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 397 (1989), *reprinted in* 1989 U.S.C.C.A.N. 432, 436 (FIRREA "grants the FDIC as conservator or receiver certain rights and powers of a receiver in equity, including the right to repudiate contracts"). Of course, a receiver in equity is subject to Section 959(b).

CONCLUSION

For the reasons stated, the petition for certiorari should be granted. In the alternative, the petition should be held pending the Court's decision in *O'Melveny & Myers* v. *FDIC*, *cert. granted*, 114 S. Ct. 543 (1993) (No. 93-489), and then disposed of as appropriate in light of the Court's decision in *O'Melveny*.

Respectfully submitted,

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May 4, 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 92-6244

RESOLUTION TRUST CORPORATION, as Receiver for Nassau Savings and Loan Association, F.A.,
Plaintiff-Appellant,

v.

SELMA DIAMOND, IRA KAUFMAN, JEROME LEDERER, PEGGY LEHMAN, SUSAN SOLOMON PATULLO, LLOYD RIBNER, as executor of the estate of MURIEL RIBNER, HORACE SOLOMON, LILLIAN SOLOMON, DENISE TUCKER, ANGELO APONTE, Commissioner of the Division of Housing and Community Renewal of the State of New York, and ROBERT ABRAMS, Attorney General of the State of New York,
Defendants-Appellees,

and

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Appellee.

December 20, 1993, Argued

March 2, 1994, Decided

JUDGES: Before: PRATT, McLAUGHLIN and JACOBS, Circuit Judges.

OPINION

JACOBS, Circuit Judge:

Resolution Trust Corporation ("RTC") is a government corporation that acts as receiver or conservator for federally-insured thrift institutions in financial distress. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), directs RTC to realize a maximum recovery on the value of the thrift assets that come into its possession, and has conferred on RTC a number of extraordinary powers to help it in doing so. Among the powers granted to RTC by Congress is the power to disaffirm or repudiate the contracts or leases which it finds to be burdensome. RTC came into possession of nine occupied condominium apartments located at 444 East 57th Street in New York City, and has sought to disaffirm or repudiate the nine tenancies, each of which is subject to local and state rent regulation. The United States District Court for the Southern District of New York (Carter, J.) granted summary judgment to the tenants and New York State and denied summary judgment to RTC on the ground that the tenancies in question, by virtue of the rent regulation laws, are "statutory" tenancies rather than leases or contracts subject to disaffirmation or repudiation by RTC. We hold that these tenancies are founded upon contract and lease obligations subject to the disaffirmation and repudiation power of RTC, and we therefore reverse.

BACKGROUND

A. FIRREA and RTC

RTC was created by Congress in 1989 as part of a comprehensive legislative initiative to mitigate a financial crisis that had engulfed the thrift industry and the Federal Savings and Loan Insurance Corporation ("FSLIC"). H.R. Rep. No. 54(I), 101st Cong., 1st Sess. (1989), reprinted in 1989 U.S.C.C.A.N. 86, 98. The Government

Accounting Office had estimated that FSLIC's operating deficit was $56 billion at the end of 1988. Id. at U.S.C.C.A.N. 100; see also S. Rep. No. 19, 101st Cong., 1st Sess. 2 (1989) ("Current estimates of the remaining cost to the Federal deposit insurance system of resolving the problem range from $50 billion to more than $150 billion . . . .").

FIRREA, adopted on August 9, 1989, Pub.L. No. 101-73, 103 Stat. 364 (codified in scattered sections of 12 U.S.C.), "constituted emergency legislation" to stop the financial hemorrhaging. S.Rep. No. 19 at 3. As the House Report puts it: "The interests of the American taxpayer demand an expedited resolution to the monumental problems involved with the unprecedented costs of dealing with hundreds of insolvent thrifts and the orderly disposition of the assets of these failed institutions." H.R. Rep. No. 54(1) at U.S.C.C.A.N. 104. RTC, a "wholly-owned government corporation," was created "to manage and dispose of the assets acquired from failed thrifts." *Id.*

RTC's primary purpose is to act as conservator or receiver for failed thrift institutions. 12 U.S.C. § 1441a (b)(3)(A) (1989 & Supp.). Congress required that RTC conduct its operations "in a manner which [] maximizes the net present value return from the sale or other disposition of" thrift assets that come into its hands. 12 U.S.C. § 1441a(b)(3)(C)(i); see also S.Rep. No. 19 at 352 (Congress intended that RTC "conduct its operations so as to maximize recovery on assets it acquires, make efficient use of funds it obtains . . . and minimize losses incurred in resolving cases.").

To help RTC in carrying out this mandate, Congress armed it with the power to disaffirm or repudiate contracts or leases that RTC in its discretion determines to be burdensome. 12 U.S.C. § 1821(e)(1) (made applicable to RTC by 12 U.S.C. § 1441a(b)(4)(A)). The reach of that power is the primary issue on this appeal.

B. Rent Regulations

Owners of residential rental property in New York City have been subject to some form of rent regulation for over fifty years. Originally imposed by the federal government during World War II (Emergency Price Control Act of 1942, Jan. 30, 1942, ch. 26, Title I, § 1, 56 Stat. 23), rent controls were continued by state legislation in 1946 (Emergency Housing Rent Control Law, L. 1946, c. 274 (codified at N.Y. Unconsol. Laws §§ 8581-8597 (McKinney 1987))). Since 1962, the City of New York has enforced its own local rent regulations, which (like the federal and state measures) regulate rents and evictions in privately owned residential housing. Admin. Code of City of N.Y., §§ 26-401-415 (reported following N.Y. Unconsol. Law § 8617 (McKinney 1987)) ("N.Y.C. Admin.Code"). Authorized by the State Legislature, these City laws were enacted pursuant to a City Council finding

> that a serious public emergency continues to exist in the housing of a considerable number of persons in the city, which emergency was created by [World War II], the effects of war and the aftermath of hostilities . . . [and therefore] such action, as a temporary measure to be effective until . . . such emergency no longer exists . . . [requires the council to intervene] to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements. . . .

N.Y.C. Admin.Code § 26-401. This finding of emergency was renewed most recently by L.1985, c.907 (effective Sept. 1, 1986).

Currently, there are two systems of rent regulation in New York: rent control and rent stabilization. Some of the nine rent-regulated condominium units at issue are rent controlled; the others are rent stabilized.

The maximum rent for each rent-controlled property is set by an administrative board on a biennial basis. N.Y.C.

Admin.Code § 26-405a(4), N.Y. Comp. Codes R. & Regs. tit. 9, § 2201.5(a) ("9 NYCRR § ——"). Upon certain enumerated contingencies, such as an increase in operating expenses, a landlord may petition the rent control board for an extraordinary increase. N.Y.C. Admin. Code § 26-405g, 9 NYCRR § 2202. So long as the tenant continues to pay the regulated rent, the landlord may not institute eviction proceedings. N.Y.C. Admin. Code § 26-408a. Rent control does not require or contemplate a current written and signed lease. In this way, the rent-controlled tenancy survives the lease-term of the original lease instrument (and any written renewals thereof), and becomes a so-called "statutory" tenancy. See, e.g., *W.T. Associates v. Huston,* 123 Misc. 2d 24, 472 N.Y.S. 2d 562, 564 (Sup. Ct. 1984).

The second program—rent stabilization—was adopted in 1969 in response to a perceived failure of rent control to adequately relieve the wartime housing emergency. N.Y.C. Admin.Code §§ 26-501-520 (McKinney 1987); see *8200 Realty Corp. v. Lindsay,* 27 N.Y.2d 124, 313 N.Y.2d 733, 742, 261 N.E.2d 647 (1970). Unlike rent control, rent stabilization does require and contemplate a current written lease-contract, 9 NYCRR § 2522.5, and requires the landlord to offer a renewal lease to the tenant before the end of each lease term. N.Y.C. Admin. Code § 26-511c(4), 9 NYCRR § 2522.5(b)(1). In that way, the rent-stabilized tenant, like his rent-controlled neighbor, enjoys occupancy for so long as he wishes. The City's rent guidelines board regularly fixes the maximum rent increase for one-year and two-year leases, N.Y.C. Admin.Code § 26-512, the allowable percentage increase being based in part on market conditions. N.Y.C. Admin. Code § 26-510b, 9 NYCRR §§ 2521-22. It was thought that by adopting a regulatory scheme more sensitive to market prices, and giving property owners (at that time) a choice between rent control and stabilization, new construction would flourish and the persistent housing emergency would abate. *8200 Realty Corp.,* 313 N.Y.S.2d at

742-43. However, the wartime housing emergency has been found to continue to this day, leaving most rental properties in New York subject to what the state's Court of Appeals once characterized as "an impenetrable thicket, confusing not only to laymen but to lawyers." In *Matter of 89 Christopher, Inc. v. Joy*, 35 N.Y.2d 213, 360 N.Y.S.2d 612, 618, 318 N.E.2d 776 (1974).

C. Martin Act

Rent regulation is also implemented by certain provisions of New York's blue sky law, the Martin Act. N.Y. Gen. Bus. Law, Art. 23-A, §§ 352-359-h (McKinney 1984). Essentially an antifraud securities statute, see *Abrams v. Long Beach Oceanfront Associates Limited Partnership*, 136 Misc. 2d 137, 518 N.Y.S.2d 323, 325 (N.Y. Sup. Ct. 1987), the act regulates (inter alia) the offer and sale of securities evidencing an ownership interest in residential real property that has undergone a conversion to condominium or cooperative ownership. When the owner of an apartment building proposes such a conversion, the Martin Act mandates the inclusion of certain disclosures in the various offering documents. Among other things, the offeror is required to disclose the conditions under which eviction proceedings may be instituted against non-purchasing tenants, and the extent to which state and local rent-regulations will continue to apply to such tenancies. N.Y. Gen. Bus. Law § 352-eeee2(c).

In any conversion of a residential building to cooperative or condominium status, the offer or sale of the underlying securities is illegal unless the offering statement has been filed with the State Attorney General. N.Y. Gen. Bus. Law § 352-el(a). No offer is considered to have been officially filed without a letter from the State Attorney General to the offeror certifying that the offeror has complied with all relevant provisions of the Martin Act. N.Y. Gen. Bus. Law § 352-e2. The Attorney General is directed to withhold the letter of certification until

he finds that the offering materials comply with the Martin Act, including the disclosures concerning the treatment of non-purchasing tenants. N.Y. Gen. Bus. Law § 352eeee2.

D. The Tenancies

The individual appellees in this case are tenants in a residential building at 444 East 57th Street in New York City. Appellee Lloyd Ribner claims status as a tenant, which RTC disputes—a collateral issue we address in a separate section of this opinion. Since we reverse the order dismissing RTC's complaint against Ribner, this opinion is fully applicable to him, except to the extent we indicate otherwise.

In 1983 the building underwent a conversion to condominium ownership, pursuant to a "non-eviction" plan under the Martin Act. N.Y. Gen. Bus. Law § 352-eeee2 (c). In accordance with the disclosure requirements of this statute, non-purchasing tenants, including the nine appellees in this case, were informed in the conversion plan offering documents that they could remain in their apartments, that (pursuant to this plan) they would not be evicted, and that any rent regulations governing their tenancies would continue to apply after the conversion was complete.

E. RTC's Repudiation

In or about 1984, the plan sponsor pledged these nine apartments to Nassau Federal Savings and Loan Association as collateral for a loan of $3.2 million. When the sponsor defaulted in the summer of 1987, title to the nine apartments passed to Nassau Federal S & L. Pursuant to FIRREA, the Office of Thrift Supervision ("OTS") appointed RTC receiver of Nassau Federal S & L in March 1990. RTC then reorganized Nassau Federal S & L as a new thrift institution called Nassau Savings and Loan Association, F.A. At about the same time, OTS

appointed RTC conservator of this new institution. On November 16, 1990, OTS issued Resolution Number 90-2003, providing that Nassau Savings and Loan would be closed, and appointing RTC as receiver. RTC is now responsible as receiver for disposing of the assets of this now-closed institution in a manner consistent with the requirements of FIRREA.

RTC sent the tenants two letters of repudiation, the first as conservator, the second as receiver. In the summer of 1990, RTC as conservator determined it was suffering a net operating loss as landlord of these nine units. On the basis of that loss (which was later calculated to be approximately $18,924 per month), RTC determined that the nine tenancies were burdensome within the meaning of 12 U.S.C. § 1821(e)(1)(B), and notified each tenant in writing that RTC was repudiating the tenancy. It further advised that, pursuant to FIRREA, each tenant had the option of (a) treating the tenancy as terminated, (b) remaining in possession for the balance of the lease-term, or (c) purchasing the unit on stated terms.[1]

The nine tenants rejected the alternative offers made by RTC, and disputed RTC's power to repudiate their tenancies. Several of them filed complaints against RTC with the New York Division of Housing and Community Renewal ("DHRC"), to which complaints RTC responded that DHCR was "without jurisdiction over the RTC and this matter." The New York Attorney General then protested by letter to RTC that it had exceeded its power in repudiating tenancies protected by New York's Martin Act and the various rent laws and regulations. In response to the concerns raised by the Attorney General, RTC adopted a policy statement assuring New York that

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[1] Ribner contends that any such correspondence was sent to his deceased mother, Muriel Ribner. As we discuss below, with respect to this individual, that contention has no material effect on this appeal.

RTC would not repudiate the leases of low-income and moderate-income tenants. See RTC Statement of Policy for the Disposition of Residential Units Which Were Previously Subject to Rent or Securities Regulations (February 22, 1991) ("Statement of Policy"). In its second letter to the tenants, RTC advised that, pursuant to its Statement of Policy, no tenant of low-income or moderate-income would be subject to lease repudiation. The Statement of Policy declares that RTC will not repudiate the tenancy of any "individual whose income does not exceed 115% of the median income in the area involved, as determined by the U.S. Secretary of Housing and Urban Development, with adjustments for family size." Counsel for the New York Attorney General estimated at oral argument that the Statement of Policy would protect New York City residents with income (before family size adjustments) of up to approximately $45,000. It does not appear from the record, nor does any appellee contend, that any of the nine tenants at 444 East 57th Street are persons of low or moderate income.

F. Procedural Events

On February 25, 1991, RTC filed a complaint naming as defendants the nine individual tenants, as well as Angelo Aponte (Commissioner of DHCR), and Robert Abrams (Attorney General of the State of New York). The complaint sought a declaration that RTC has the power to repudiate the tenancies in question, and an order of eviction against Ribner, who (the complaint alleged) holds no valid interest in the tenancy of his mother's apartment. RTC sought other relief as well, which we expressly decline to address. Soon thereafter, the Attorney General and DHCR filed a complaint against RTC, alleging that RTC lacked the statutory authority to pursue its claims, and requesting declaratory and injunctive relief against RTC. These actions were subsequently consolidated.

In February 1992, the parties filed cross-motions for summary judgment: RTC requested that the district court grant it the relief prayed for in its complaint; the Attorney General and DHCR asked for a declaration that RTC lacked authority to evict "non-purchasing, rent-controlled or rent-stabilized tenants from condominium or cooperative units in buildings converted to condominium or cooperative status under a non-eviction plan filed . . . pursuant to [the Martin Act]," and also requested a permanent injunction barring RTC from pursuing its claims. In addition, Ribner moved to dismiss RTC's complaint against him, and defendant Susan Patullo filed a motion to either dismiss RTC's complaint or, in the alternative, grant her summary judgment. (Patullo's motion apparently was never addressed below.) On August 21, 1992, after full briefing and argument, the District Court issued an opinion (a) granting New York's motion, (b) denying RTC's motion, and (c) granting Ribner's motion to dismiss the complaint against him. *Resolution Trust Corp. v. Diamond,* 801 F.Supp. 1152 (S.D.N.Y. 1992).

In its opinion, the district court framed and answered two questions: "1) whether the tenants in this case have occupancy rights by virtue of leases or instead pursuant to statutory tenancies independent of any leases; and 2) if these rights derive from statutory tenancies, whether the 'any contract or lease' language of section 1821(e)(1) empowers the RTC to repudiate statutory tenancies . . . ." 801 F. Supp. at 1157. In addressing the first question, the district court examined the rent control and rent stabilization programs, as well as the Martin Act, and determined that tenants under these various schemes "enjoy occupancy rights that are independent of any lease they may have with their landlords, in this case the RTC." 801 F. Supp. at 1159. It then held that, because the nine tenants enjoy "rights of occupancy created by state statute and independent of any contract or lease between the landlord and tenant," those rights cannot be repudiated under "the plain language" of FIRREA authorizing RTC

to repudiate "any contract or lease." 801 F. Supp. at 1161.

Having held that these tenancies were not within the scope of the express language of the statute, the district court went on to address RTC's alternative argument that there is an irreconcilable conflict between the state laws and FIRREA, such that application of the state regulations would obstruct RTC's operation under FIRREA. Applying "conflict preemption" analysis, the district court concluded that insofar as the statute did not expressly include "statutory" tenancies within its scope, it could not be construed to grant RTC any power with respect to these tenancies: "since the power prohibited by state law in this case was never granted to the RTC in the first place, no preemption of state law is possible here." 801 F. Supp. at 1164. Finally, the district court refused to grant summary judgment to either side on RTC's claim against Ribner, but did grant Ribner's motion to dismiss the complaint against him.

On appeal, RTC asserts express authorization in FIRREA allowing RTC to repudiate rent-regulated tenancies that it determines to be burdensome. RTC also argues that New York's rent regulations directly conflict with RTC's statutory mandate to maximize asset values and that, because compliance with both the state and federal laws is—with respect to these tenancies—impossible, the Supremacy Clause of the Constitution requires a finding that RTC's power to repudiate the leases of "non-needy" tenants preempts any non-federal rent regulation. We hold that these tenancies are grounded in a contract or lease and therefore fall within the express language of FIRREA and its grant to RTC of the power to repudiate "contracts or leases." Because we find that repudiation of these tenancies is within the scope of the express statutory grant of power to RTC, we find it unnecessary to reach the issue of "conflict preemption."

Accordingly, we reverse the district court's order, and direct that judgment be entered for RTC as to its power

of repudiation. With respect to Ribner, we find that, although the district court was correct in denying the cross-motions for summary judgment, RTC did state a claim upon which relief may be granted, and we therefore vacate the dismissal of RTC's complaint against Ribner and remand for further proceedings.

ANALYSIS

A. FIRREA

RTC's power to repudiate contracts and leases was conferred by Congress as a tool for maximizing net asset values. The power is described in section 11 of the Federal Deposit Insurance Act ("FDIA"):

> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease—
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in [its] discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in [its] discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. § 1821(e)(1). FIRREA expressly applies this provision to RTC. 12 U.S.C. § 144*a*(b)(4)(A). It is unquestionable that this provision grants RTC full discretionary powers to disaffirm or repudiate any burdensome executory contract or lease. See, e.g., *Resolution Trust Corp. v. CedarMinn Building Ltd. Partnership*, 956 F.2d 1446, 1456 (8th Cir.), cert. denied, 121 L. Ed. 2d 56, 113 S. Ct. 94 (1992). This apeal therefore turns on whether the tenancies in question are contractual in nature or whether the various rent regulations transformed these tenancies into some non-contractual, non-leasehold

property interest such that they are outside the scope of the statute.

For these reasons, the definition of the phrase "contract or lease" is a matter of federal law. See, e.g., *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 557-8, 109 L. Ed. 2d 588, 110 S. Ct. 2126 (1990) ("Our construction of the term 'debt' [in the Bankruptcy Code] is guided by the fundamental canon that statutory interpretation begins with the language of the statute itself."); *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 431, 90 L. Ed. 2d 428, 106 S. Ct. 1931 (1986) (federal law governs meaning of "deposit" in federal statute). Although we are not bound by any state court pronouncements regarding the breadth or scope of these terms, we do consult for guidance the body of New York law concerning the design and operation of the rent regulation programs at issue. We also, of course, continue to defer to state courts' pronouncements regarding the definition of property interests. See *Butner v. United States*, 440 U.S. 48, 55, 59 L. Ed. 2d 136, 99 S. Ct. 914 (1979). However, as we fully explain below, were we to find that New York law creates "statutory" tenancies not ultimately based on a lease or other voluntary contractual arrangement, we would have to consider whether such a statutory grant of a property interest amounts to the taking of private property without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

B. Regulated Tenancies

A tenancy is an interest in the exercise of dominion over property for a fixed or computable duration. Restatement (Second) of Property § 1.4 (1977). A tenancy is initiated by a voluntary contractual arrangement between the landlord and tenant, typically memorialized in a written and signed lease. See, e.g., N.Y. Gen. Oblig. Law § 5-703 (McKinney 1989) (tenancy for period exceeding one year must be evidenced by writing, signed by

party to be charged). In many states, however, it is possible to create a tenancy of short duration by oral lease agreement, without any written evidence of the terms. *Id.*; see also Restatement (Second) of Property § 2.1.

Only two terms are indispensable to the creation of a tenancy: the duration, or "term"; and the price, or "rent." In addition, lease terms typically impose other obligations on the landlord (such as the provision of various services, doormen, appliances, lighting of common areas, etc.) and on the tenant (such as maintaining the premises, avoiding excessive noise, timely reporting any needed repairs, etc.). The bundle of rights and duties will vary from tenancy to tenancy—the only common denominator being that every contract will specify rent and duration.

Although tenancy is premised on a voluntary contractual arrangement, certain obligations may be affected by operation of law. For example, regardless of any express terms to the contrary, virtually all states read a warranty of habitability into residential lease-contracts. See, e.g., N.Y. Real Prop. Law § 235-b (McKinney 1989); Restatement (Second) of Property § 5.1 (reporter's note listing states). Moreover, some states prohibit or refuse to enforce certain lease clauses. See, e.g., Conn. Gen. Stat. Ann. § 41a-4 (West 1993) (unenforceable clauses include confession of judgment and tenant's consent to distraint of personal property). While these laws change the obligations of nonconforming contracts, the voluntary and contractual nature of the relationship remains. All terms unaltered by law continue to be enforceable obligations, and each party is free to continue or discontinue the tenancy in accordance with the terms of the contract.

New York and the nine tenants contend that New York's tight net of regulation creates a statutory tenancy that is in effect non-contractual, and beyond the reach of RTC's repudiation power. We address below each of the three regulatory systems cited and relied upon by New

York and the rent-regulated tenants: (1) rent stabilization; (2) rent control; and (3) The Martin Act.

1. Rent Stabilization

New York's rent stabilization laws regulate the two terms at the core of the landlord-tenant relationship: rent and duration. The regulations govern the initial rent, N.Y.C. Admin.Code § 26-512b, 9 NYCRR § 2521, restrict rent increases, N.Y.C. Admin.Code § 26-512a, 9 NYCRR § 2522, mandate lease renewal, N.Y.C. Admin. Code § 26-511c(4), 9 NYCRR § 2522.5(b)(1), and, upon the tenant's vacating of the premises, allow the tenancy to pass statutorily to certain members of the tenant's household so long as that individual has lived with the tenant since the inception of the tenancy or, in the case of the death of the tenant, for at least the two years immediately preceding the tenant's demise. 9 NYCRR § 2523.5(b).

Landlord compliance with this scheme is enforced chiefly by limiting the grounds for eviction: "As long as the tenant continues to pay the rent . . . no tenant shall be denied a renewal lease or be removed from any housing accommodation" except on specified grounds. 9 NYCRR § 2524.1(a). Such grounds include the owner's desire to take possession for the owner's own use as a primary residence (§ 2524.4), and certain wrongful acts by the tenant (§ 2524.3). A landlord who fails to proffer a renewal lease will get no increase in rent until he comes into compliance with the Code. 9 NYCRR § 2522.5(b)(2). The incentive in this provision ensures that virtually all rent-stabilized tenancies will be governed by a written lease-contract.

Rent stabilization is therefore lease-based in the sense that it operates through the regulation of lease terms. The program contemplates and requires a written lease-contract as the basis of tenancy. See 9 NYCRR § 2520.12 ("The provisions of any lease or other rental agreement

shall remain in force pursuant to the terms thereof, except insofar as those provisions are inconsistent with [the rent regulations] . . ."). While statutory provisions alter or restrict important terms of the contract, the tenancy retains much of the character of a voluntary contract. Rent-stabilized tenancy is dependent upon a lease in these ways, and therefore is subject to RTC's repudiation power under § 1821(e).

2. Rent Control

New York's rent control statute does not contemplate or require a current written lease of the premises. Even though the original tenancies were created by written lease-contracts years (often decades) earlier, the landlord under rent control is not required to proffer a renewal lease at expiration, and the rent-control tenant is not required to sign one. So long as the tenant pays the rent, the landlord may not evict: "No tenant, so long as he or she continues to pay the rent . . . shall be removed from any housing accommodation which is subject to rent control . . . notwithstanding the fact that the tenant has no lease or that his or her lease . . . has expired or otherwise terminated . . . ." N.Y.C. Admin.Code § 26-408a. The district court concluded therefore that the rent-controlled tenancy is something distinct from a property interest under a lease or contract. We disagree.

The rent-controlled tenancy bears many of the hallmarks of a contractual relationship. Indeed, it is difficult to see any other lawful basis for the landlord-tenant relationship. Under rent control, the landlord and tenant owe mutual obligations: the tenant is obligated to pay rent, and the landlord is obligated to provide a bundle of rights and services. The regulations provide that a landlord may not reduce the level of services that were provided to the tenant under the initial tenancy-creating contract. 9 NYCRR § 2201.2 ("Every landlord shall furnish with housing accommodations the same dwelling space and the same essential services, furniture, furnishings and equip-

ment as were furnished, or required to be furnished, on April 20, 1962 or any subsequent date determining the maximum rent."). The kind, level and schedule of services that the landlord owes the rent-control tenant is therefore determined by reference to the original lease-control creating the tenancy. See 9 NYCRR § 2200.13 ("The provisions of any lease or other rental agreement shall remain in force pursuant to the terms thereof, except insofar as those provisions are inconsistent with the Rent Law or these regulations."). Taken together, these two provisions enforce many of the original contractual elements of the tenancy. This being so, the landlord-tenant relationship is defined and governed by contract, rent control notwithstanding.

The courts of New York recognize that the terms of the last written lease continue to remain in effect under rent control. In *Barrow Realty Corp. v. Village Brewery Restaurant, Inc.*, 272 A.D. 262, 70 N.Y.S.2d 545, 546 (App.Div. 1947), New York's intermediate appellate court considered whether or not a provision of the original lease (providing that the tenant shall pay the landlord's attorney fees in a proceeding brought because of tenant's default) survived the lease expiration, and concluded that "the clause . . . is carried over, as are other provisions of the lease, to the tenant's occupancy during the period in which he remains in possession under the emergency rent law after the expiration of the term of the lease." The absence of any current written lease notwithstanding, the court held:

> Default in the payment of the emergency rent is not merely a statutory default; it is a default under the lease. . . . The continued occupancy permitted by the statute stems from the lease and the tenancy created thereby, and the emergency rent is fixed on the basis of the rental established in the lease. With the terms of the lease otherwise remaining in force, it may not fairly be said that the rent payable during

> the emergency period is merely a statutory rent and is not under the lease.

Id., see also *Hudson View Properties v. Weiss*, 109 Misc. 2d 589, 442 N.Y.S.2d 367, 370 (App.Term 1981) ("In the case of a statutory tenancy . . . 'with the exceptions of the duration of the term, and the amount of rent payable, the rule established by the weight of authority is that insofar as the provisions of a lease which has expired are not in conflict with the then prevailing emergency rent statutes, and are not confined to the period of the expired lease, they are projected into the statutory tenancy, and will continue in effect during the term of the statutory tenancy.'" (quoting Rasch, New York Landlord and Tenant, 2d Ed., § 286)), rev'd, 86 A.D.2d 803, 448 N.Y.S.2d 649 (App.Div. 1982), rev'd, 59 N.Y.2d 733, 463 N.Y.S.2d 428, 450 N.E.2d 234 (1983); *130 West 57 Corp. v. Hyman*, 188 Misc. 92, 66 N.Y.S.2d 332, 334 (App.Term 1946) ("The housing emergency calls for such stringent measures but it would be carrying the protection afforded a tenant to an unfair degree to hold that the obligations of the tenancy incorporated in the lease do not govern the relationship of landlord and tenant. . . . The rights and obligations of the parties under the lease are projected into and become part of the statutory tenancy, except where they are plainly inconsistent with the Act.").[2]

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[2] See also *65 Central Park West, Inc. v. Greenwald*, 127 Misc. 2d 547, 486 N.Y.S.2d 668, 672 (N.Y. City Civ.Ct. 1985) ("The fact that the original lease has expired is irrelevant because the terms and conditions of that lease are said to continue in the context of the rent controlled statutory tenancy." (citation omitted)); *Stephen Estate, Inc. v. Kaplan*, 198 Misc. 948, 100 N.Y.S.2d 455, 460-61 (N.Y. City Mun.Ct. 1950) ("The conventional relationships of landlord and tenant, with privity of contract and privity of estate, existed . . . prior to the expriation of the lease. That under the Emergency Housing Laws, the provisions of a lease, except for the term and the rent reserved are projected into and become a part of the statutory tenancy is now beyond question." (citations omitted)).

Rent control, like rent stabilization, affects the lease by statutorily altering and specifying certain terms, chiefly by granting the tenant a statutory renewal option. That option to renew is exercised, at least tacitly, when the tenant continues in occupancy after receiving notice of the biennial rent adjustment made pursuant to the statute and regulations, N.Y.C. Admin.Code § 26-405a(4), 9 NYCRR § 2201.5, thereby agreeing to pay the new rent during the next two years. But rent control does not obliterate the lease.

Even were we to agree with New York that a rent-controlled tenancy is independent of any lease (which we do not), we would still hold that it is sufficiently rooted in contract to fall within the express language of FIRREA. While these tenancies are tightly regulated and policed, such a regime does not eliminate the contractual nature of the relationship, any more than do the regulatory schemes governing the provision of such services as electric power, natural gas, medallion taxi rides, or cable television. Some contracts are more heavily regulated than others, but they are not thereby transformed into something non-contractual or super-contractual.

The voluntary and contractual aspects of the rent-control arrangement distinguish it from the kind of housing measure invalidated by the New York Court of Appeals as an unconstitutional taking in *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059, cert. denied, 493 U.S. 976, 107 L. Ed. 2d 503, 110 S. Ct. 500 (1989). There, the Court of Appeals struck down a local ordinance requiring owners of properties used as single-room occupancy housing ("SRO's") to rehabilitate their buildings for use as SROs indefinitely, and contrasted that ordinance with rent regulations such as those at issue in this case: "the rent-control and other landlord-tenant regulations that have been upheld . . . merely involved restrictions imposed on existing tenancies where the landlords had voluntarily put

their properties to use for residential housing." 544 N.Y.S. 2d at 548. The SRO ordinance was found to be a per se taking because its coercive design eliminated the voluntary and contractual nature of the landlord-tenant relationship, and " 'interferes so drastically' . . . with the SRO property owners' fundamental rights to possess and to exclude." 544 N.Y.S.2d at 548 (quoting *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 836, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987), and citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982)).

We conclude, therefore, that New York's statutory tenancies—whether under rent stabilization or rent control —are contract-based leaseholds. That being the case, they fall within the express language of § 1821(e), and are subject to RTC's statutory power to repudiate. By repudiating the contract or lease creating the tenancy, RTC is effectively dissolving the tenancy. Once it has done so, no statutory or regulatory provision—at least none that can pass constitutional muster—can revive that tenancy.

3. The Martin Act

The Martin Act, New York's blue sky law, alters our analysis not at all. "No private action has been expressly authorized" in the Martin Act. *CPC Int'l Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 519 N.Y.S.2d 804, 807, 514 N.E.2d 116 (1987). "The specific purpose of the statute was to create a statutory mechanism in which the Attorney-General would have broad regulatory and remedial powers to prevent fraudulent securities practices. . . ." *Id.* Most enforcement of the Martin Act is in the hands of the Attorney General, usually by means of a fraud action.

The Martin Act requires the offeror to reassure tenants in the offering documents that their rights under rent regulation will survive if they do not buy their apartments.

The Act does not add to those rights in any way, however. The Attorney General enforces the offeror's obligation by his power to control the sale of securities. Thus the Martin Act forbids the sale of the cooperative or condominium shares unless the offering documents have been certified for filing by the Attorney General (and filed), and prohibits the Attorney General from certifying the offering documents for filing unless they contain the requisite disclosures and assurances. N.Y. Gen. Bus. Law § 352-eeee2.

The Martin Act thus does no more than require that certain statements be included in the offering documents. It creates no private affirmative right and no private right of action. *Rego Park Gardens Owners, Inc. v. Rego Park Gardens Associates*, 191 A.D.2d 621, 595 N.Y.S.2d 492, 494 (App.Div. 1993) ("It is now well settled that there is no private cause of action under the Martin Act.") (citing *CPC Int'l v. McKesson Corp.*, 70 N.Y.2d 268, 519 N.Y.S.2d 804, 514 N.E.2d 116 (1987); *Vermeer Owners v. Guterman*, 78 N.Y.2d 1114, 578 N.Y.S.2d 128, 585 N.E.2d 377 (1991); *Board of Managers of Fairways at North Hills Condominium v. Fairways at North Hills*, 150 A.D.2d 32, 545 N.Y.S.2d 343 (App. Div. 1989)). Non-purchasing tenants of a condominium subject to a Martin Act conversion plan hold their tenancies by contract (however that contract may have been shaped and extended by legislation), and these tenancies are therefore subject to repudiation by the RTC.

C. Congressional Intent

If it chooses, Congress can grant disaffirmation or repudiation power in a way that preserves state regulated leases and contracts. For example, under the Bankruptcy Code a trustee in bankruptcy is granted power to "assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). In *In re Friarton Estates Corp.*, 65 B.R. 586 (Bankr. S.D.N.Y. 1986), the court held that a debtor-lessor could not use that provision to

repudiate leases that were subject to New York's rent control laws. New York's brief on the present appeal, and the opinion of the district court, rely heavily on Friarton. However, as Bankruptcy Judge Prudence Abram noted in *Friarton*, the Bankruptcy Code includes an express provision allowing the tenant to effect "any renewal or extension of such term that is enforceable by such lessee under applicable nonbankruptcy law." 65 B.R. at 593 (quoting 11 U.S.C. § 365(h)(1)). *Friarton* bars the debtor from exercising the power to repudiate leases that are rent-controlled or rent-stabilized, because the tenant's right to renew and extend the tenancy is conferred by "applicable nonbankruptcy law."

The express deference to "applicable nonbankruptcy law" in the Bankruptcy Code which saves from repudiation lease renewal rights enforceable under rent control, has no counterpart in FIRREA or FDIA. The bankruptcy provision has been in the Code since its inception in 1978. Pub.L. No. 95-598, 92 Stat. 2574 (1978). When Congress enacted FIRREA in 1989, Congress borrowed and adopted many of the provisions of the Bankruptcy Code dealing with a lessee's rights when the debtor-lessor rejects a lease contract. See S.Rep. No. 19 at 314 (12 U.S.C. § 1821(e) was "closely modeled on parallel provisions of section 365 of the Bankruptcy Code."). It is telling that the only relevant feature that Congress omitted from 12 U.S.C. § 1821(e)(5) was the one that grants the lessee a right to exercise his renewal or extension options under "applicable nonbankruptcy law."[3]

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[3] Compare 11 U.S.C. § 365(h)(1) ("If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor . . . the lessee . . . may treat such . . . as terminated by such rejection . . . or, in the alternative, the lessee . . . may remain in possession of the leasehold . . . for the balance of such term and for any renewal or extension of such term that is enforceable by such lessee . . . under applicable nonbankruptcy law.") with 12 U.S.C. § 1821(e)(5)(A) ("If the conservator or receiver repudiates an unexpired written lease of real property . . . the lessee under such lease may either—(i) treat the lease as

This alone strongly signifies Congressional intent to grant RTC greater powers in this respect than those given to a bankrupt debtor. See *Wheeler v. Greene*, 280 U.S. 49, 51, 74 L. Ed. 160, 50 S. Ct. 21 (1929) "When so important a grant of power contained in the prototype is left out from the copy it is almost impossible to attribute the omission to anything but design, or to believe that it left to very attenuated implications what the model before it so clearly expressed.").

The textual distinction between FIRREA/FDIA and the Bankruptcy Code is reinforced by functional considerations. Without the deference to "applicable nonbankruptcy law" in the Code, prospective bankrupts could achieve solvency by acquiring rent-regulated properties before filing under Chapter 11 so that the rent-regulated leases could be alchemized by repudiation. Thus the Code's bar on the repudiation of rent-regulated leases prevents the use of the bankruptcy process as a device for emptying rent-controlled properties.

These same concerns do not arise in the FIRREA context. RTC does not acquire properties for speculation and is not actively seeking to acquire rent-regulated properties in order to repudiate leases. Under its statutory mandate, RTC simply disposes of properties that come into its hands from failed financial institutions. Absent any likelihood of predatory behavior by RTC as receiver or conservator, there was no reason for Congress to restrict the kinds of tenancies subject to its repudiation powers, and every reason for Congress to strengthen RTC's hand in remedying a national economic emergency.

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terminated by such repudiation; or (ii) remain in possession of the leasehold interest for the balance of the term of the lease unless the lessee defaults under the terms of the lease after the date of such repudiation.").

D. Post-Repudiation Occupancy Rights

Once RTC repudiates a lease, a tenant may choose to "remain in possession of the leasehold interest for the balance of the term of the lease . . . ." 12 U.S.C. § 1821 (e)(5)(A)(ii). New York and the tenants argue that, even if a statutory tenancy is a leasehold, New York law makes the leasehold perpetual, and that RTC therefore is not entitled to evict them even if RTC has power to repudiate the leases. If the leasehold were truly perpetual, this argument would mandate affirmance of the result reached by the district court.

How long is "the balance of the term of the lease" when the RTC repudiates a rent-regulated New York tenancy? Since tenancies under the rent stabilization law are expressly lease-based, § 1821(e)(5)(A)(ii) allows the tenant to continue the tenancy on existing terms until the end of the lease term during which the notice of repudiation is given.

Rent-controlled tenancies, however, do not run for any specified term. There are two conceivable arguments for the idea that the term is perpetual: first, by analogy to perpetual written leases under New York law; second, by reference to the potentially lifelong and inheritable nature of rent-controlled occupancy.

Under New York law, a perpetual lease can be created by the grant of a fee interest in property coupled with the grantor's reservation of a right to collect rent forever. See *First Religious Society in Whitestown v. Socony Mobil Oil Co.*, 44 Misc. 2d 415, 253 N.Y.S.2d 839, 842 (Sup. Ct. 1964) (grant of fee interest in property, where grantor reserves right to collect rent in perpetuity, landlord-tenant relationship under a perpetual lease). Such an arrangement, however, is disfavored by the law and can come into being only if the lease itself clearly provides for perpetual tenancy. See *Garner v. Gerrish*, 63 N.Y.2d 575, 483 N.Y.2d 973, 975, 473 N.E.2d 223 (1984). In the absence of an express lease duration or an

express term of perpetuity, New York law assigns a lease term, usually a short one. See N.Y. Real Prop. Law § 232 (McKinney 1989) (where parties fail to specify, lease of New York City property ends October 1, following possession); see also Restatement (Second) of Property § 1.5, and Comment (d) to that section ("Where the parties enter into a lease of no stated duration and periodic rent is reserved or paid, a periodic tenancy is presumed. The period thus presumed is equal to the interval for which rent is reserved or paid to a maximum periodic tenancy of year to year."); N.Y. Real Prop. Law §§ 232-a (notice to terminate month to month tenancy in New York City), 232-c (holding over tenant after expiration of term; effect of landlord's acceptance of rent); *28 Mott Street Co. v. Summit Import Co.*, 34 A.D.2d 144, 310 N.Y.S.2d 93 (App. Div. 1970) (occupancy of premises for six years, bimonthly payments and unexecuted ten year lease, together created year to year tenancy), aff'd, 28 N.Y.2d 508, 319 N.Y.S.2d 65, 267 N.E.2d 880 (1971).

New York contends that a rent-controlled lease term ends when the right of occupancy ends, which would allow a repudiated lease to run under § 1821(e)(5)(A)(ii) for the lives of the tenant, the tenant's spouse or life companion, and of their issue. However, the power of repudiation under section 1821(e) was conferred in aid of an acute financial emergency, and cannot be construed fairly to accommodate so prolonged a residual tenancy. In any event, we cannot use these statutory occupancy rights to delimit the leasehold for FIRREA purposes because the statutory tenancy is by definition limited to the life of the statute, and therefore cannot outlive the declared end of the wartime housing emergency that the statute purports to remediate. Moreover, the temporary nature of the rent control laws is needed to insulate them from constitutional challenge. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440, 73 L.Ed. 2d 868, 102 S. Ct. 3164 (1982) ("This Court has consistently affirmed that States have broad power to regulate

. . . the landlord-tenant relationship . . . . In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party." (citations omitted)); *Block v. Hirsh*, 256 U.S. 135, 157, 65 L. Ed. 2d 865, 41 S. Ct. 458 (1921) ("A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.").

Rent-controlled tenancy under New York law is therefore neither perpetual nor measured by the life of the tenant (and the tenant's successors). New York law provides two intervals that can be used to fix the term of a rent-controlled tenancy. Under N.Y. Real Prop. Law § 232, a lease agreement for real property in New York City that fails to specify a duration is deemed to end on the October 1 next following the date that the tenant occupies the premises. That rule, however, is evidently designed to supply a missing term in an unregulated contract. Since a specific body of New York law regulates rent-controlled tenancies, and since that body of law extended the tenancy, we first consider whether that body of law divides the tenancy into periods analogous to lease terms. Since it does, we look no further. Under rent control the lease term ends, for purposes of § 1821(e), on the biennial January 1 date on which the landlord next becomes entitled (following the notice of repudiation) to a review of the maximum base rent. See N.Y.C. Admin. Code § 26-405a(4)). Therefore, the term of a rent controlled tenancy is two years, commencing on the January 1 of the last biennial review set by the statute prior to notice of repudiation.

E. Other Arguments

New York argues that, even if RTC has the power to repudiate these tenancies, RTC has violated its statutory mandate in repudiating the nine tenancies at issue on this appeal. First, New York contends that there was no proper basis for RTC's determination that these leases

are "burdensome". RTC, as conservator or receiver, may repudiate contracts or leases "the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome." 12 U.S.C. § 1821(e)(1)(B). New York contends that "burdensomeness" must be evaluated in terms of RTC's statutory mandate to "maximize the net present value return" on asset disposition. Underlining the word "present," New York argues that "Congress instructed RTC to focus" on the asset's "current value, not its value at some future date," and that the "current value" of the nine condominium apartments is their value under rent control and rent stabilization.

We are unpersuaded. The "current" value of any rented property is of course affected by a leasehold interest; but that happens regardless of whether the leasehold is "statutory." The point is that Congress has expressly conferred a power of repudiation that allows RTC to realize "current" value of property free of such leaseholds. Moreover, Congress instructed RTC to exercise its discretion in determining which contracts or leases are burdensome, pursuant to an overarching mandate to "maximize the net present value return" on assets in its possession. It is uncontroverted that (a) these tenancies are causing RTC to lose close to $19,000 per month and (b) these occupied rent-regulated units are worth millions of dollars less than they are worth vacant or free of rent regulations. It cannot be said therefore that RTC abused its discretion in finding these tenancies burdensome.

Next, New York argues that "if FTC prevails in this case, it will be empowered to proceed to repudiate [other] statutory tenancies" and that this "will have a farreaching effect" on New York's housing market. This, according to New York, violates FTC's obligation to consider the adverse impact of its actions on local communities" inasmuch as "thousands of long-term tenants [will be] suddenly evicted from their homes."

New York points to RTC's obligation to minimize the impact of its asset dispositions on "local real estate and financial markets." 12 U.S.C. § 1441a(b)(3)(C)(ii). As to these nine tenancies—the only ones at issue at this time—even the simultaneous sale of all nine would have no more than a de minimis effect on the market. As to all others, we simply lack sufficient information to tell.[4] For example, we do not know how many of these units have below-market rents, how many might be occupied by tenants whose income renders the tenancy ineligible for repudiation under RTC's Statement of Policy, how many tenancies RTC will exercise its statutory discretion to repudiate, which ones out of that number will be purchased by the current tenants, over what time the remaining units would come on the market, whether RTC would spread unit sales over time to advance its own interest in maintaining a firm market, and how RTC might otherwise exercise its discretion (conferred by Congress) to avoid adversely impacting the market. Until RTC exercises its discretion to actually repudiate an appreciable number of additional tenancies, a court is not in a position to consider whether or not RTC's conduct falls within the rather nebulous statutory parameters, or even who (if anyone) would have standing to raise the issue.[5]

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[4] According to RTC, however, it currently holds approximately 274 rent-regulated cooperative or condominium units, which represents approximately .015% of the 1,884,000 residential rental units in New York City. Accepting arguendo New York's contention that this number could be closer to 1,000, this would still only amount to .053% of the rental market.

[5] New York expresses concern for the "far reaching effects on the tenants." However, any impact on tenants will be mitigated by RTC's express policy not to exercise its repudiation power with respect to families of low and moderate income. Under the current Statement of Policy (and pursuant to 12 U.S.C. § 1441a(b)(3)(C)(v)), the only rent-regulated tenants who would be exposed to possible repudiation of their tenancies are those with income (according to the figure proffered by New York at oral argument) in excess of $45,000 per year.

Finally, New York urges that any repudiation of these "statutory" tenancies will constitute a taking without just compensation in violation of the Fifth Amendment to the Constitution. This argument fails for at least two reasons. First, New York assumes there is a property interest here warranting compensation if "taken." However, any property interest in a temporary estate, by definition, can extend only to the end of the term of that estate. We have already decided that each tenant has the option of remaining in possession through the end of the tenancy's term: so nothing is being "taken." Second, New York in its brief identifies the thing taken as "leasehold interests." But § 1821(e) expressly authorizes the repudiation of leases, and in several places refers to the repudiation of a tenant's "leasehold interest." See 12 U.S.C. §§ 1821(e)(5)(A)(ii) and (B). The state's regulatory overlay certainly makes these tenancies more advantageous, but that simply reinforces RTC's finding that they are burdensome.

F. Conflict Preemption

Having held that § 1821(e) expressly authorizes RTC to repudiate the tenancies at isuse, we have no occasion to reach or address "conflict" preemption, a provocative issue thoroughly considered by the district court. 801 F. Supp. at 1162-64. We note, however, that the Resolution Trust Corporation Completion Act, Pub.L. No. 103-204, 107 Stat. 2369 (1993), signed into law three days before the oral argument of this appeal, contains the following provision under the heading "RTC Management Reforms" (and the subheading "contracting procedures"): "nothing in this Act, or any other provision of law, shall supersede the [RTC's] primary duty of minimizing costs to the taxpaye. and maximizing the total return to the Government." 12 U.S.C. § 1441a(w)(19)(B). Inasmuch as the affirmation or disaffirmation of a contract is arguably a "contracting procedure," this could be read to accomplish the preemption of state rent regulations, to the extent they interfere with RTC's mandate. We are not required to reach this issue, however.

G. Ribner's Claim to Tenancy

Lloyd Ribner alleges that he holds his tenancy by succession from his mother, Muriel Ribner. For this succession to be valid under New York's rent regulations, he must have resided in his mother's apartment at least for two years immediately prior to her death. 9 NYCRR § 2204.6(d)(1). In support of its motion for summary judgment, RTC presented evidence that Ribner had moved into the apartment only several weeks before his mother's death, and that within several days of her demise he had once again vacated the premises. Ribner provided rebuttal evidence in the form of an affidavit stating that he "resided with her contemporaneously for several years prior to her death . . . ." On this basis, the District Court found there to be a disputed material fact in issue, and denied both parties' motions for summary judgment.

When a moving party has supported his motion with an affidavit, Rule 56(e), Fed.R.Civ.P. requires that "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." We cannot say that Ribner failed to satisfy this requirement. That depends on whether, given the artful phrasing of his affidavit, his having "resided with [his mother] contemporaneously" means (as it is calculated to suggest) that he resided with her continuously for the period of "several years"; that "several" means two or more; and that "prior" means immediately prior. Nothing less or different would satisfy the minimum statutory requirement. See *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (to successfully oppose motion for summary judgment, non-moving party must demonstrate more than "some metaphysical doubt as to the material facts, . . . [it] must come forward with 'specific facts showing that there is a genuine issue for trial.' ") (quoting Fed. R. Civ. P. 56 (e)). Notwithstanding these possible ambiguities, we conclude that the district court correctly denied both parties' motions for summary judgment on this issue.

The district court also dismissed the complaint against Ribner, because it could find "no indication that [thirty days' notice of intent to regain possession, required by New York rent control law] was ever served upon Ribner." 801 F. Supp. at 1164. This conclusion is wholly inconsistent with Ribner's admission (through his incorporation by reference of portions of the affidavit filed by another tenant) that he received a letter on August 17, 1990 indicating RTC's intent to repudiate the tenancy. That letter was received a full six months prior to the filing of RTC's complaint, and thus fully satisfies any thirty-day notification requirement. We therefore vacate the District Court's dismissal of RTC's complaint.

CONCLUSION

Title 12 U.S.C. § 1821(e) expressly authorizes RTC to "disaffirm or repudiate" tenancies subject to New York's rent stabilization and rent control laws—these tenancies being based in contract or lease. We therefore reverse the District Court's order, and direct it to enter summary judgment for RTC on the issue of RTC's power to repudiate these tenancies. As to defendant-appellee Lloyd Ribner, we affirm the district court's refusal to grant summary judgment, and vacate the district court's order dismissing the complaint. We also remand for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. NEW YORK

Nos. 91 Civ. 1361 (RLC), 91 Civ. 1683 (RLC)

RESOLUTION TRUST CORPORATION, as receiver of Nassau Savings and Loan Association, F.A.,
Plaintiff,

v.

SELMA DIAMOND, IRA KAUFMAN, JEROME LEDERER, PEGGY LEHMAN, SUSAN SOLOMON PATTULLO, LLOYD RIBNER, as executor of the estate of Muriel Ribner, deceased, HORACE SOLOMON, LILLIAN SOLOMON, DENISE TUCKER ANGELO APONTE, Commissioner of the Division of Housing and Community Renewal of the State of New York, and ROBERT ABRAMS, Attorney General of the State of New York,
Defendants.

ROBERT ABRAMS, Attorney General of the State of New York, and NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Plaintiffs,

v.

RESOLUTION TRUST CORPORATION, NASSAU SAVINGS AND LOAN ASSOCIATION, F.A., JEROME MARON, and ANTHONY T.S. CONRAD,
Defendants.

Aug. 21, 1992

ROBERT L. CARTER, District Judge.

At issue in these consolidated actions is whether the Resolution Trust Corporation ("RTC") is empowered by federal statute to evict tenants in RTC-controlled apartments in violation of state rent control, rent stabilization, and securities laws. The RTC contends that its enabling statute contains such authorization, and that contrary state laws are preempted under the Supremacy Clause of the United States Constitution. The Attorney General of the State of New York and the New York State Division of Housing and Community Renewal ("DHCR") (collectively the "State") argue that the RTC has no such power, and that state laws regulating rent and evictions are not preempted and must be obeyed by the RTC. Both the RTC and the State have moved separately for summary judgment.

The first of the consolidated cases is a declaratory judgment action, No. 91 Civ. 1361 (RLC), brought by the RTC as receiver of Nassau Savings and Loan Association, F.A. ("Nassau Savings"), against Angelo Aponte, the Commissioner of DHCR; Robert Abrams, the Attorney General of the State of New York; and the individual lessees of nine condominium units located at 444 East 57th Street, New York, New York (the "East 57th Street units") that the RTC acquired as a result of the failure of Nassau Federal Savings and Loan Association ("Nassau Federal"). The RTC has sought to evict rent-regulated tenants in the East 57th Street units and has adopted a policy statement which sets out its intention to take similar action against rent-regulated tenants in all other cooperative and condominium units under its control.[1]

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[1] The RTC adopted a "Statement of Policy for the Disposition of Residential Units Which Were Previously Subject to Rent or Securities Regulation" (the "policy statement") in February, 1991. The policy statement declares, in relevant part:

> 1. The policy of the RTC will be to exercise its disaffirmaance or repudiation powers with regards [*sic*] to these units

In this action the RTC, which was established by Congress for the purposes of managing and disposing of the assets of failed savings and loan institutions, seeks to establish that it has the right under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. 101-73, 103 Stat. 183; 12 U.S.C. § 1441a(b), to disaffirm and repudiate condominium and cooperative unit leases; that this authority under FIRREA preempts any state law or regulation to the contrary; and that the RTC may therefore sell the East 57th Street units pursuant only to FIRREA provisions and without restraint of any law or regulation of New York State or New York City.

In the second of the consolidated actions, No. 91 Civ. 1683 (RLC), the State challenges the RTC's authority

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when it determines that: 1) the insured depository intention is a party to the lease; 2) the performance of which the conservator or receiver determines, in its discretion, to be burdensome; and 3) . . . the disaffirmance or repudiation of which the conservator or receiver determines, in its discretion, will promote the orderly administration of the institution's affairs.

2. Where the RTC finds that units are leased by low or moderate income tenants, the RTC will not exercise its disaffirmance or repudiation powers with respect to those units. For this purpose, a low or moderate income tenant is defined as a family or individual whose income does not exceed one hundred and fifteen percent (115%) of the median income in the area involved. . . .

3. Where the RTC determines to disaffirm or repudiate the leases of such units, the RTC may, in its discretion, offer the units for sale to the existing tenants or negotiate other arrangements, on terms which the RTC finds acceptable, in accordance with its mandate to maximize recoveries on the assets of the institutions in its control. If the existing tenants decline or fail to purchase the units or to enter into any other agreement acceptable to the RTC, the RTC will be free to consummate the disaffirmance or repudiation and to take whatever action it deems appropriate for the disposition of the units.

Complaint, No. 91, Civ. 1361 (RLC), Exhibit D.

to disregard New York State's comprehensive statutory scheme regulating the offer and sale of cooperative and condominium apartments and the rights of rental tenants. The State seeks declaratory and injunctive relief enjoining the RTC from taking any action in violation of the state rent and securities laws.

I.

The RTC finds its power to repudiate the leases of tenants of rent-regulated housing in 12 U.S.C. § 1821(e)(1), a part of FIRREA, which reads as follows:

> (e) Provisions relating to contracts entered into before appointment of conservator or receiver.
>
> (1) Authority to repudiate contracts.
>
> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may *disaffirm or repudiate any contract or lease*—
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. § 1821(e)(1) (emphasis added). The RTC argues that state rent and securities laws that regulate allowable rents and provide tenants with protection from eviction frustrate the accomplishment of the RTC's mandate under FIRREA to maximize the net present value of the assets of failed thrift institutions. The RTC therefore asserts that it may, pursuant to its discretionary powers under section 1821(e)(1), repudiate and disaffirm

the leases of tenants in rent-regulated housing under its control in New York State, and thereby exercise control over the apartments free from the constraints of the state rent and securities laws.

The State responds that FIRREA does not give the RTC the power to disregard the requirements of state rent and securities laws. The State argues that the occupancy rights of tenants in New York's rent-regulated housing do not stem from leases or contracts, but instead from statutory tenancies created by the state rent control and rent stabilization laws. The State contends that section 1821(e)(1) gives the RTC power to repudiate or disaffirm contracts and leases but not statutory tenancies, and that the RTC therefore does not have the power to evict the East 57th Street tenants, or any other tenants of rent-regulated housing under RTC control in New York State.

The RTC replies to the State's argument by asserting that FIRREA has preempted whatever rights tenants in rent-regulated housing may have under New York statutory law, thereby leaving only a lease relationship between the tenants and the RTC as landlord. The RTC would then be free to repudiate the leases under section 1821 (e)(1). The issue of whether the state rent and securities laws are preempted by FIRREA is complicated, however, and will require extensive discussion.

Under the Supremacy Clause of the United States Constitution, laws passed by Congress become the law of the land, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. IV, Cl. 2. However, "[p]reemption of state law by federal statute is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258 (1981) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S.

132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963)). This presumption against preemption applies especially where the state law said to be preempted is within the traditional police powers of the states. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978); *Rogers v. Consolidated Rail Corp.*, 948 F.2d 858, 859 (2d Cir. 1991). In such cases, the party arguing for preemption carries a heavy burden of showing that preemption was the "clear and manifest purpose of Congress." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Com.*, 461 U.S. 190, 206, 103 S.Ct. 1713, 1723, 75 L.Ed.2d 752 (1983); *see also General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir.1990) ("compelling evidence" of an intent to preempt must be shown where the area is traditionally regulated by the states).

The state laws that the RTC claims are preempted by FIRREA deal with rent and real estate securities regulation, which are areas within the traditional police powers of the states. *See Rowe v. Pierce*, 622 F.Supp. 1030, 1033 (D.D.C.1985). Accordingly, there is a presumption against preemption of the state laws by FIRREA.[2]

[2] The RTC argues that the presumption against preemption only arises where the *federal* legislation regulates areas traditionally within the police powers of the states, not where the state laws allegedly preempted do so. The RTC asserts that FIRREA, as a federal banking statute designed to solve a crisis among savings and loan institutions, is not a federal statute that involves the traditional police powers of the states, and that therefore no presumption against preemption should apply here.

This argument misses the mark. First, the cases make clear that a presumption against preemption arises not only when federal legislation involves areas historically reserved to the states, but also when the state statutes sought to be preempted do as well. *See Rogers, supra*, 948 F.2d at 859; *Medical Soc. of State of New York v. Cuomo*, 777 F.Supp. 1157, 1160-61 (S.D.N.Y.1991) (Haight, J.).

Second, the rationale behind having such a presumption in the first place applies whether the federal or the state laws involve the traditional police powers of the states. The doctrine is designed

Federal statutes can preempt state laws in three ways: expressly, through implication, or where there is a conflict between the state and federal laws. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 108 S.Ct. 1145, 1150, 99 L.Ed.2d 316 (1988); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987). Express preemption is found where the federal legislation contains an express statement of a clear and manifest intent to preempt state laws. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). Implied preemption occurs where there is a clear indication that Congress intended to occupy the entire regulatory field. *Guerra, supra*, 479 U.S. at 280-81, 107 S.Ct. at 689. The third type of federal displacement of state law, "conflict preemption," occurs either where there is a conflict between the federal and state laws which makes compliance with both laws physically impossible, or where there is a conflict in which application of the state law will create an obstacle to the accomplishment of the full objectives of Congress. *California v. ARC America Corp.*, 490 U.S. 93, 100-101, 109 S.Ct. 1661, 1664-1665, 104 L.Ed.2d 86 (1989); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984); *Medical Soc. of State of New York v. Cuomo*, 777 F.Supp. 1157, 1161 (S.D.N.Y.1991) (Haight, J.). The RTC contends that the state rent and securities laws are preempted on the basis of express provisions of

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to ensure that the traditonial police powers of the states not be lightly superseded by federal laws. *See California v. ARC America Corp.*, 490 U.S. 93, 101, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Given this rationale, it matters little whether the federal legislation addresses areas of traditional state concern directly, or whether the state laws that the federal legislation is claimed to preempt address such state police powers. In either case, concern for protecting against unintentional federal displacement of state laws justifies a presumption against preemption by federal law.

FIRREA and because of a conflict between the state laws and FIRREA.

II. *Express Preemption*

The RTC argues first that FIRREA expressly preempts the state rent and securities regulations. The RTC relies on 12 U.S.C. § 1821(c)(2)(C), which reads: "When acting as conservator or receiver . . . the [RTC] shall not be subject to the direction or supervision of any . . . State in the exercise of the [RTC]'s rights, powers and privileges." The RTC asserts that the state rent and securities laws subject the RTC to the direction of the state in the exercise of the RTC's rights, powers and privileges, and that the state provisions are therefore expressly preempted by section 1821(c)(2)(C). However, the State challenges the RTC's apparent assumption that its "rights, powers and privileges" include the power to repudiate a statutory tenancy. If, as the State argues, the tenants in the East 57th Street units occupy their apartments by virtue of statutory tenancies rather than leases, and if the RTC does not have the power under section 1821(e)(1) to repudiate such statutory tenancies, then the RTC's "rights, powers and privileges" do not include the power to repudiate the tenancies, and there can be no express premption under section 1821(c)(2)C).

Accordingly, determination of whether the state rent and securities laws are expressly preempted by FIRREA requires the court to address two separate questions: 1) whether the tenants in this case have occupancy rights by virtue of leases or instead pursuant to statutory tenancies independent of any leases; and, 2) if these rights derive from statutory tenancies, whether the "any contract or lease" language of section 1821(e)(1) empowers the RTC to repudiate statutory tenancies as well as the more traditional landlord-tenant relationship embodied in a lease.

A. *Occupancy Rights of Rent-Regulated or Non-Purchasing Cooperative and Condominium Tenants*

The State claims that the East 57th Street tenants, and others in their situation, are in continued possession of their apartments not by virtue of any leases entered into between themselves and their landlords, but because of statutory tenancies created by at least one of three statutes: New York's rent control law, its rent stabilization law, or a section of its general business law commonly referred to as the "Martin Act."

New York law provides two systems of protection for certain rental properties: rent control and rent stabilization. Both systems regulate allowable rents and protect tenants from eviction except under specified circumstances. Section 26-408 of New York's rent control law provides:

> No tenant, so long as he or she continues to pay the rent to which the landlord is entitled, shall be removed from any housing accommodation which is subject to rent control under this chapter by action to evict or recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession notwithstanding the fact that the tenant has no lease or that his or her lease, or other rental agreement, has expired or otherwise terminated, notwithtsanding any contract, lease, or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto, . . .

except on certain specified grounds, e.g. that the tenant is violating a substantial obligation of the tenancy, or where the landlord has obtained a certificate of eviction from the supervising government agency. N.Y. City Admin.Code § 26-408 a, *reported following* N.Y. Unconsol. Law § 8617 (McKinney 1987). The language of the statute itself makes clear that the tenants it covers

enjoy a protection from eviction that is independent of any lease that may exist between landlord and tenant.

New York case law supports this interpretation. As the court noted in *In re Friarton Estates Corp.*, 65 B.R. 586 (Bankr.S.D.N.Y.1986), "[u]nder New York law, the occupancy of a statutory tenant is 'not under any agreement, express or implied, but by virtue of the compulsion exerted on the landlord by the local emergency rent laws which allowed him to remain in possession.'" *Id.* at 592 (quoting *Whitmarsh v. Farnell,* 298 N.Y. 336, 343, 83 N.E.2d 543 (1949). Similarly, when called upon to determine whether rent-controlled tenants held their apartments by lease or by statutory tenancy, the court in *W.T. Associates v. Huston,* 123 Misc.2d 24, 26, 472 N.Y.S.2d 562, 564 (Sup.Ct.N.Y.Cty.1984), held that rent controlled tenants "are statutory tenants . . . [who] do not hold leases. . . ." Thus, the tenants in the East 57th Street units, as well as all other tenants in rent-controlled housing now under the control of the RTC, enjoy occupancy rights under New York law that are independent of any lease or contractual relationship with their landlords.

New York's rent stabilization laws are structured somewhat differently, but the result is the same. The rent stabilization law requires owners to grant a renewal lease of one or two years to all rent-stabilized tenants. *See* N.Y. City Admin.Code § 26-511, *reported following* N.Y. Unconsol. Law § 8617 (McKinney 1987); N.Y. Comp. Codes R. & Regs. tit. 9, part 2522.5 (1990). However, while rent-stabilized tenants, unlike rent-controlled tenants, do hold leases, they also enjoy statutory rights that are independent of any lease. If a landlord refuses to offer a tenant a renewal lease, the tenant has the right under statutory law to remain in possession and continue paying the previously authorized rent. The leases merely provide a means for periodically increasing the rents landlords are allowed to charge. *See Park Summit Realty Corp. v. Frank,* 107 Misc.2d 318, 323, 434 N.Y.S.2d 73, 76-77 (App. T. 1st Dep't 1980), *aff'd,* 84 A.D.2d 700, 448

N.Y.S.2d 414 (1st Dep't 1981), *aff'd*, 56 N.Y.2d 1025, 453 N.Y.S.2d 643, 439 N.E.2d 358 (1982) (applying *Whitmarsh v. Farnell, supra*, 298 N.Y. at 343, 83 N.E.2d 543, reasoning to rent stabilization as well as rent control context); Affidavit of Angelo Aponte, Commissioner of DHCR, Jan. 9, 1992, ¶¶ 12-16. Accordingly, even if RTC repudiated the leases of rent-stabilized tenants in the condominium or cooperative units it controls, those tenants would still enjoy statutory rights to remain in possession of their apartments indefinitely and without a rent increase. Aponte Affidavit, ¶ 14.

The third law that the State contends gives a statutory tenancy to the tenants at the East 57th Street units, as well as to other non-purchasing tenants in cooperative and condominium units controlled by the RTC, is the Martin Act, N.Y. Gen. Bus. Law, §§ 352 *et seq.* (McKinney 1984). The Martin Act governs the offer and sale of securities, commodities, cooperative apartments and condominiums, and regulates the conversion of residential apartment units to cooperative or condominium ownership. The 45-unit building at 444 East 57th Street was converted to condominium ownership under sections 352-e and 352-eeee of the Martin Act between 1981 and 1983. The conversion was accomplished under a non-eviction plan, which provides certain protections for tenants who decide not to purchase their units at the below-market "insider's" price the conversion guarantees them, but instead to continue to rent the apartments as before.

Section 352-eeee(2)(c)(ii) sets forth permissible reasons for which a non-purchasing tenant may be evicted from the apartment, such as non-payment of rent, illegal use of the apartment, or refusal of access to the owner, but otherwise provides that "[n]o eviction proceedings will be commenced at any time against non-purchasing tenants for failure to purchase or any other reason applicable to expiration of tenancy." *Id.* Accordingly, tenants protected by the Martin Act may only be evicted for one of the reasons enumerated in section 352-eeee(2)

(c)(ii), not because their lease has expired or been extinguished. This provision of the Martin Act therefore grants non-purchasing tenants of converted cooperative or condominium apartments occupancy rights separate from any lease agreement they may have with the owners of their apartments. Further, this section specifically provides that "an owner of a unit or of the shares allocated thereto may not commence an action to recover possession of a dwelling unit from a non-purchasing tenant on the grounds that he seeks the dwelling unit for the use and occupancy of himself or his family." *Id.* It is clear, therefore, that the statutory scheme grants indefinite rights of occupancy to the non-purchasing tenants, and that the purchaser of an occupied apartment is on notice of his potentially long-term inability to occupy the apartment himself. These statutory occupancy rights are separate from and in addition to the occupancy rights guaranteed to rent-regulated tenants under the rent control and rent stabilization statutes, thereby providing non-eviction protection even for apartments whose rents are not controlled by the state.

The RTC argues, without contesting any of the above, that the tenants nevertheless hold their apartments by leases which it can repudiate under FIRREA. The RTC asserts that the tenants hold their apartments pursuant to either 1) the leases which existed prior to application of rent regulation laws, or 2) the leases which remain under a holdover tenancy after preemption of state law. RTC's brief in opposition to State's motion for summary judgment, at 27. Both these arguments put the proverbial cart before the horse, however. The first ignores the fact that the state rent and securities laws do exist, and that whatever lease or other landlord-tenant relationship existed prior to the enactment of those laws is now irrelevant. The second is simply illogical, since it fails to realize that the state laws will be preempted only if FIRREA grants the RTC power to repudiate statutory tenancies. Whatever leases exist after preemption be-

comes relevant only after preemption has been decided, not before. Furthermore, even if there is a contractual element to the landlord-tenant relationship under the rent regulations and securities laws, the above discussion demonstrates that the tenants' right of occupancy is still independent of that contractual or lease relationship. Therefore, the RTC's power to repudiate whatever lease or contract exists does not affect the occupancy rights, which are secured by statute.

Accordingly, the State is correct that the East 57th Street tenants, as well as other rent-regulated or non-purchasing cooperative or condominium tenants in New York, enjoy occupancy rights that are independent of any lease they may have with their landlords, in this case the RTC.

B. *Does the "any contract or lease" language of FIRREA include statutory tenancies?*

As noted above, section 1821(e)(1) of FIRREA empowers the RTC to repudiate or disaffirm "any contract or lease" that it deems, in its discretion, to be burdensome to the failed institution. Since rent-regulated and non-purchasing cooperative or condominium tenants hold their apartments pursuant to statutory tenancies rather than traditional leases, the issue now presented is whether FIRREA's statutory language, "any contract or lease," is broad enough to include the statutory tenancies.

The RTC initially argues that the court is prevented from interpreting this section of FIRREA by 12 U.S.C. § 1821(j), which provides:

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors [of the RTC] by resolution or order, to restrain or affect the exercise of powers or functions of the [RTC] as a conservator or a receiver.

Just what this section of FIRREA means is disputed by the parties. The RTC seeks to interpret it broadly, as a

prohibition on the construction or interpretation of FIRREA by federal courts absent an express invitation to do so by the RTC itself. This broad interpretation, however, would be unconstitutional and is therefore untenable. As the court in *Rosa v. Resolution Trust Corp.*, 752 F.Supp. 1231 (D.N.J.1990), observed, " 'FIRREA did not, and Constitutionally could not, divest an aggrieved plaintiff of the right to seek legal redress when the very subject of the grievance is agency action that is allegedly arbitrary and statutorily impermissible.' " *Id.* at 1236 (quoting *Rechler Partnership v. Resolution Trust Corp.*, No. 90 Civ. 3091 (D.N.J. Sept. 4, 1990), slip op. at 4.9-4.10).[3] While any judicial interpretation of FIRREA would, in its most general sense, "restrain" the RTC, this broad interpretation of the prohibition in section 1821(j) would "vest RTC with unreviewable power to do as it pleases," and thereby constitute a clear violation of the separation of powers. *Rechler Partnership, supra,* at 4.8.

The State advocates a narrower view of section 1821(j), characterizing it as at most a restraint on federal court interference with the substantive decisions of the RTC, not as a prohibition against judicial interpretation and construction of FIRREA. This is the interpretation adopted by the Third Circuit in *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 397-98 (3d Cir.1991). There, the court first considered what the RTC's "powers or functions" were under FIRREA, and then examined

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[3] The RTC notes that *Rosa* was overturned by the Third Circuit. While the district court's preliminary injunction was indeed reversed, *Rosa v. Resolution Trust Corp.*, 938 F.2d 383 (3d Cir.1991), the appeals court did not reject the district court's reasoning regarding the scope of section 1821(j). Instead, the court stressed that its ruling involved only "application of section 1821(j) to a portion of this injunction, and we express no opinion as to the general scope of the language of that provision." 938 F.2d at 399 n. 21. The rest of the appellate opinion in *Rosa* is consistent with the narrower interpretation of this section discussed below.

whether the disputed court action would "restrain or affect" those statutory powers and thereby violate section 1821(j). Undertaking the same analysis here, it is clear that the court's efforts to interpret FIRREA in this case will not restrain the exercise of the RTC's powers or functions, and therefore will not run afoul of section 1821(j), if those powers or functions do not include the repudiation of statutory tenancies. Therefore, the dispute about the prohibition of section 1821(j) effectively merges with the determination of whether section 1821(e)(1) expressly preempts the state rent and securities laws, since if the "any contract or lease" language in section 1821(e)(1) does not include statutory tenancies, there will be no preemption and no judicial "interference" as restricted by section 1821(j).

Returning therefore to the construction of "any contract or lease" in section 1821(e)(1), the case of *In re Friarton Estates Corp.*, 65 B.R. 586 (Bankr.S.D.N.Y. 1986) is instructive once again. In that case, the bankruptcy court considered whether a trustee in bankruptcy might, pursuant to section 365 of the Bankruptcy Code, 11 U.S.C. § 365, remove rent-controlled tenants from apartments owned by the bankrupt party. Section 365 empowers the trustee to "assume or reject any executory contract or unexpired lease of the debtor," just as section 1821(e)(1) of FIRREA authorizes the RTC to repudiate or disaffirm "any contract or lease." The *Friarton* court remarked that the trustee's power to remove statutory tenants under the authorization of section 365 was "suspect," since, as noted above, rent-regulated tenants do not hold leases, but rather statutory tenancies. *Friarton, supra*, 65 B.R. at 592.[4] The same reasoning applies here,

[4] The court in *Friarton* set forth two alternative grounds for its holding that the debtor could not avoid the strictures of the state rent control laws through bankruptcy. One is its construction of the "executory contract or unexpired lease" language in section 365, discussed above. The other ground for its holding was that, under 28 U.S.C. § 959(b), trustees in bankruptcy are obligated

where the plain language of the statute, "any contract or lease," does not include rights of occupancy created by state statute and independent of any contract or lease between the landlord and tenant. *Cf. Patterson v. Federal Deposit Ins. Corp.*, 918 F.2d 540, 543 (5th Cir. 1990) (finding that since plaintiff's homestead right was protected by the Texas constitution, it was independent of any agreement between the parties and therefore not included within term "agreement" in 12 U.S.C. § 1823 (e)).

Lending further support to the view that "any contract or lease" should not be interpreted broadly to include non-lease statutory rights of occupancy is Congress' list of duties and goals for the RTC. 12 U.S.C. § 1441a (b)(3)(C) instructs the RTC to conduct its operations in a manner which:

> (i) maximizes the net present value return from the sale or other disposition of institutions . . . or assets of such institutions;
>
> (ii) minimizes the impact of such transactions on local real estate and financial markets;
>
> (iii) makes efficient use of funds obtained from the Funding Corporation or from the Treasury;
>
> (iv) minimizes the amount of any loss realized in the resolution of cases;
>
> (v) maximizes the preservation of the availability and affordability of residential real property for low- and moderate-income individuals.

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to obey all "valid laws of the state," thereby requiring compliance with the state rent regulatory laws. The RTC seeks to distinguish *Friarton* by pointing out that there was no preemption of state law in that case because of section 959(b). That argument, while true, does not diminish the fact that the *Friarton* court's construction of the "executory contract or unexpired lease" language is still relevant to the construction issue presented here.

The court may look to all of these instructions for guidance in interpreting the other provisions of FIRREA that set forth the powers Congress granted the RTC. *See King v. St. Vincent's Hosp.*, —— U.S. ——, ——, 112 S.Ct. 570, 574, 116 L.Ed.2d 578 (1991) ("a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context."); (citations omitted). Three of the instructions are relevant to the RTC's powers under section 1821(e)(1). Subdivision (i), which instructs the RTC to maximize the net present value return of the assets of failed thrift institutions under its control, clearly weighs in favor of an expansive interpretation of the RTC's repudiation powers under section 1821 (e)(1). Such expansive powers would enable the RTC to increase the value of its apartments under rent and securities law restrictions. However, Congress's admonition to the RTC in subdivision (ii) to minimize the impact of the RTC's actions on the real estate market weighs in favor of a narrow construction of section 1821 (e)(1). Broadening the powers of the RTC under section 1821(e)(1) by allowing it to repudiate tenants' non-lease rights of occupancy would negatively affect the real estate market in New York, and thus run counter to 12 U.S.C. § 1441a(b)(3)(C)(ii).[5] Further, subdivision (v), which requires the RTC to maximize the preservation of affordable housing, also weighs against expanding the scope of the RTC's powers under section 1821(e)(1), since some of the tenants potentially affected by the

[5] The effect of the real estate market in New York can be appreciated by the following figures: As of February, 1991, the RTC was in control of approximately 1,000 rent-regulated condominium or cooperative apartments in New York State. It expected about 1,000 more such apartments to come into its control over the next year. Affidavit of Frederick K. Mehlman, Jan. 8, 1992, Exhibits AA and BB. Interpreting section 1821(e)(1) to include the power to repudiate non-lease statutory occupancy rights would remove all of these apartments from rent and securities laws restrictions, and would certainly have a large impact on the real estate market in New York.

RTC's asserted power to repudiate leases in this situation are undoubtedly low- and moderate-income tenants. This is true despite the fact that there is no indication in the present record that the tenants of the nine East 57th Street units are low- or moderate-income individuals, and that New York's rent protections are not linked to income.[6]

Accordingly, two of the three relevant goals behind the RTC's powers counsel a restricted rather than expansive interpretation of the RTC's powers. Therefore, the court declines to expand the reach of section 1821(e)(1) beyond traditional leases and contracts, especially in light of the presumption against preemption that operates in this case. *See Rowe v. Pierce*, 622 F.Supp. 1030, 1033 (D.D.C.1985).

Having determined that the RTC's repudiation powers under section 1821(e)(1) do not extend to statutory tenancies created under state law, and that rent-regulated or non-purchasing tenants of cooperative or condominium apartments hold statutory tenancies instead of leases, it is clear that the RTC's rights, powers, and privileges do not include the power to evict rent-regulated or non-purchasing tenants of cooperative or condominium apartments. Since the state's rent control, rent stabilization, and real estate securities laws therefore do not subject the RTC to state supervision or direction in the exercise of its rights, powers and privileges, those laws are not expressly preempted by FIRREA. 12 U.S.C. § 1821(c)(2)(C).

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[6] While the RTC's policy statement on repudiation does exempt low- and moderate-income tenants from eviction, this is irrelevant to the scope of the RTC's *power* under section 1821(e)(1) to repudiate statutory tenancies. Since section 1821(e)(1) says nothing about income levels, if the section is interpreted to encompass the power to repudiate statutory tenancies, the RTC would not be required to adopt the income exemption that it has in fact adopted in this case.

The RTC's arguments on express preemption misunderstand the issues before the court. In all of the cases cited by the RTC, there was clear power in the federal statute to do whatever the government agency sought to do. Here, no such power exists. Accordingly, those cases are inapposite. *See, e.g., Resolution Trust Corp. v. Elman*, 949 F.2d 624 (2d Cir.1991) (RTC's clear power under section 1821(d)(5)(D) to disallow any claim by a creditor or claim of security or priority preempts state retaining lien law); *Federal Deposit Ins. Corp. v. Shain, Schaffer & Rafanello*, 944 F.2d 129 (3d Cir.1991) (same).

III. *Conflict Preemption*

The court must next consider whether FIRREA has preempted the state rent and securities laws because of a conflict between state and federal law. A conflict exists when application of the state laws will create "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *International Paper Co. v. Ouellette*, 479 U.S. 481, 492, 107 S.Ct. 805, 811, 93 L.Ed.2d 883 (1987) (citations omitted); *see also ARC America Corp., supra*, 490 U.S. at 100-101, 109 S.Ct. at 1664-1665; *Silkwood, supra*, 464 U.S. at 248, 104 S.Ct. at 621. Preemption will depend, therefore, on what Congress' objectives were in enacting FIRREA, and on whether the state laws present an obstacle to their accomplishment.

The RTC argues that its congressional mandate under FIRREA to "manage and resolve" failed thrift institutions effectively preempts all state laws that conflict in any way with its efforts to resolve the failed institutions, and that since the state rent and securities laws involved here conflict with those efforts, they are perforce preempted. These contentions do not withstand analysis, however.

First, the RTC claims that there is a direct conflict in this case between state laws that prevent repudiation of residential "leases" and FIRREA's provision authoriz-

ing such repudiation. As the prior discussion demonstrates, however, no such direct conflict exists, since FIRREA does not provide the power the RTC seeks to exercise in this case. FIRREA does not authorize the RTC to repudiate statutory tenancies, and since the tenants in this case enjoy occupancy rights by virtue of those statutory tenancies, the RTC has no power to evict the tenants. Thus, the situation here is not one where a federal statute allows certain agency action while state laws prohibit it, as the RTC claims.

Second, the RTC complains that the state laws effectively thwart its efforts to comply with Congress' mandate to "maximize the net present value return from the sale or other disposition of institutions . . . or the assets of such institutions." 12 U.S.C. § 1441a(b)(3)(C). Therefore, the RTC argues, the state rent and securities laws should be preempted in order to allow the RTC to accomplish its mandate. The congressional mandate in section 1441a(b)(3)(C), however, is an instruction to the RTC on how to exercise the powers granted to it under other sections of FIRREA; it is not a grant of power in itself. The fact that the RTC would be freer to pursue one of its statutory goals if the state law restrictions did not exist does not by itself require preemption, since no conflict exists between federal statutory power and state statutory restrictions.

Further, since Congress did not give the RTC the power that it seeks to exercise here, i.e. to repudiate statutory tenancies, such repudiation cannot be part of the objectives of Congress that the court must consider under the conflict preemption analysis. While the RTC's inability to evict rent-regulated tenants may indeed hinder its resolution efforts, since hinderance derives not from restrictions state laws place on the powers of the RTC, but rather from the fact that Congress did not give the RTC the power to repudiate statutory tenancies in the first place. Therefore, the RTC's protestations that state

rent and securities laws thwart its efforts to dispose of the assets of failed savings and loans are misdirected. The RTC should be complaining to Congress, not to the State of New York, since it is Congress that has impaired the RTC's ability to repudiate statutory tenancies, not New York State. Absent the statutory power it seeks, there is no conflict between federal and state laws in this area, and consequently no basis for preemption of the state rent and securities laws.

The cases cited by the RTC in its conflict preemption brief all deal with direct conflict between specific powers granted in federal statutes and contrary state law restrictions, and are therefore inapposite to the question presented here. *See, e.g., Colorado ex rel. Colorado State Banking Bd. v. Resolution Trust Corp.*, 926 F.2d 931, 936 (10th Cir.1991) (conflict between 12 U.S.C. § 1836 (k), which allows emergency acquisitions of bank branches notwithstanding any provision of state law, and state laws prohibiting branch acquisition through mergers); *Feedral Deposit Ins. Corp. v. Bank of Boulder*, 911 F.2d 1466 (10th Cir.1990) (conflict between state law prohibition of assignment of letters of credit and 12 U.S.C. § 1823(c)(2)(A), which contains clear authorization for FDIC to purchase assets and liabilities of insured savings and loans); *NCNB Texas Nat'l Bank v. Cowden*, 895 F.2d 1488, 1501 (5th Cir. 1990) (conflict between federal statute allowing FDIC to transfer fiduciary appointments of an insolvent bank to federally established bridge banks and state statutes forbidding such transfers); *Valley Ranch Dev. Co. v. Sunbelt Sav. FSB*, 714 F.Supp. 817 (N.D.Tex.1989) (conflict between Texas fraudulent transfer statute and FSLIC's power under federal statute to transfer assets in its discretion).

While Congress certainly intended FIRREA to give the RTC broad powers,[7] the fact remains that it did not give

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[7] In creating the RTC, Congress intended to "enhance certain powers of the FDIC and to eliminate impediments to the efficient

the RTC the power to repudiate statutory tenancies. The RTC cannot enlarge its powers under FIRREA by arguing that Congress' objectives for it were broader than the powers granted by statute; conflict preemption doctrine cannot be used to give the RTC powers that Congress did not see fit to confer on the corporation. Conflicts only exist where there is power under federal statute that is prohibited under state law. Since the power prohibited by state law in this case was never granted to the RTC in the first place, no preemption of state law is possible here.

IV. *Lloyd Ribner's Rights of Succession*

The RTC also moves for declaratory judgment that it is entitled to evict one of the individual tenants, Lloyd Ribner, Jr., from apartment 14-E at 444 East 57th Street. Ribner seeks to succeed to the occupancy rights of his recently deceased mother. The RTC contends that, even if it is subject to the state rent control and securities laws, Ribner has no right to occupy this apartment. Under the rent control law, a person is entitled to succeed to the right of possession of a rent-controlled apartment where

> [the] family member has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years, or where such person is a "senior citizen" or "disabled person" . . .

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resolution of failed financial institutions." *Federal Deposit Ins. Corp. v. Shain Schaffer & Rafanello*, 944 F.2d 129, 131 (3d Cir. 1991); *see also Smallwood v. Office of Thrift Supervision*, 925 F.2d 894 (6th Cir.1991). FIRREA evidences congressional intent to give broad powers to the RTC to resolve the crisis in the savings and loan industry, including powers that the savings and loans did not enjoy prior to being taken over by the RTC. *See, e.g.*, 12 U.S.C. § 1825(b) (no involuntary liens against the property of the receiver); 12 U.S.C. § 1821(d)(12) (mandatory 90-day stay of pending litigation); 12 U.S.C. §§ 1829 and 1822 (no bonds required of the FDIC).

> for a period of no less than one year immediately prior 'o the permanent vacating of the housing accommodation by the tenant. . . .

N.Y. Comp.Codes R. & Regs., tit. 9, part 2204.6(d)(1) (1990). Ribner alleges that he lived with his mother in the apartment for the requisite period of time. *See* Affidavit of Lloyd Ribner, Jr., Jan. 24, 1992, ¶ 2; Reply Affidavit of Lloyd Ribner, Jr., Jan. 31, 1992, ¶ 1. The RTC presents evidence that he did not occupy the apartment for the required time period, and that he is therefore not entitled to succeed to his mother's tenancy. Affidavit of David A. Yadgaroff, Jan. 30, 1992, ¶¶ 2-4. Given this dispute as to the facts concerning Ribner's occupancy of the apartment, summary judgment cannot be granted to either side on this issue. Rule 56, F.R.Civ.P.[8]

Nevertheless, Ribner points out that the RTC is required by the rent control laws to give him thirty days' notice before bringing any proceeding to regain possession of the apartment. N.Y. City Admin.Code, 26-403 (e)(2)(i)(10) *reported following* N.Y. Unconsol. Law § 8617 (McKinney 1987); *Louis v. Barthelme*, 179 A.D.2d 604, 579 N.Y.S.2d 656 (1st Dep't 1992). The record contains no indication that such a notice was ever served upon Ribner. Accordingly, the RTC's complaint must be dismissed as against Ribner.

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[8] Ribner's counsel cites New York procedural law throughout his brief in support of summary judgment. Counsel is reminded that in federal court, even where state law provides the substantive rule of decision, the Federal Rules of Civil Procedure, as explicated in the decisions of federal courts, govern procedural matters such as the standard for summary judgment. *See* Rule 56, F.R.Civ.P.; *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

V. *Conclusion*

In sum, the State's motion for summary judgment is granted and the RTC's motion for summary judgment is denied. FIRREA has not preempted New York's rent control law, its rent stabilization law, or the sections of its general business law dealing with the offer and sale of securities, and the RTC must abide by their provisions. Further, the motion of Lloyd Ribner, Jr., to dismiss the complaint in No. 91 Civ. 1361 as against him is granted.

IT IS SO ORDERED.

APPENDIX C

SELECTED NEW YORK STATE STATUTORY PROVISIONS

Emergency Housing Rent Control Law, N.Y. Unconsol. L. (McKinney 1987)

§ 8585. Evictions

1. So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodation with respect to which a maximum rent is in effect pursuant to this act by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession notwithstanding the fact that the tenant has no lease or that his lease, or other rental agreement has expired or otherwise terminated, notwithstanding any contract, lease agreement or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto . . . .

§ 8590. Prohibitions

1. It shall be unlawful, regardless of any contract, lease or other obligation heretofore or hereafter entered into, for any person to demand or receive any rent for any housing accommodations in excess of the maximum rent or otherwise to do or omit to do any act, in violation of any regulation, order or requirement hereunder, or to offer, solicit, attempt or agree to do any of the foregoing.

New York State Rent and Eviction Regulations, 9 N.Y. Comp. Codes R. & Regs., codified after N.Y. Unconsol. L. § 8597 (McKinney 1987)

§ 2100.12. Withdrawal from rental market

Nothing in this Subchapter shall be construed to require any person to offer any housing accommoda-

tions for rent, but housing accommodations already on the rental market may be withdrawn only after an order is issued by the Administrator under section 2104.9, if such withdrawal requires that a tenant be evicted from such accommodations.

§ 2104.1. Restrictions on removal of tenant, including hotel tenants

(a) So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease, or other rental agreement has expired or otherwise terminated, notwithstanding any contract, lease agreement or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto

. . . .

§ 2104.9. Withdrawal of occupied housing accommodations from rental market

A certificate shall be issued where the landlord establishes that he seeks in good faith to permanently withdraw occupied housing accommodations from both the housing and nonhousing rental markets without any intent to rent or sell all or any part of the land or structure and (a) that he requires the entire structure containing the housing accommodations or the land for his own immediate use in connection with a business which the landlord owns and operates in the immediate vicinity of the property in question, or

* * * *

(d) that the continued operation of the housing accommodations would impose other undue hard-

ship upon him. No certificate shall be issued under this section where the granting of the certificate is inconsistent with the purposes of the Act.

The Martin Act, N.Y. Gen. Bus. L. § 352-eeee.2(c)(ii) (McKinney 1984)

§ 352-eeee. Conversions to cooperative or condominium ownership in the city of New York

2(c)(ii) No eviction proceedings will be commenced at any time against non-purchasing tenants for failure to purchase or any other reason applicable to expiration of tenancy; provided that such proceedings may be commenced for non-payment of rent, illegal use or occupancy of the premises, refusal of reasonable access to the owner or a similar breach by the non-purchasing tenant of his obligations to the owner of the dwelling unit or the shares allocated thereto; and provided further that an owner of a unit or of the shares allocated thereto may not commence an action to recover possession of a dwelling unit from a non-purchasing tenant on the grounds that he seeks the dwelling unit for the use and occupancy of himself or his family.

SELECTED NEW YORK CITY STATUTORY PROVISIONS

New York City Rent Control, N.Y.C. Admin. Code, codified after N.Y. Unconsol. L. § 8617 (McKinney 1987)

§ 26-408. Evictions

a. No tenant, so long as he or she continues to pay the rent to which the landlord is entitled, shall be removed from any housing accommodation which is subject to rent control under this chapter [1] by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession notwithstanding the fact that the tenant has no lease or that his or her lease, or other rental agreement, has expired or otherwise terminated, notwithstanding any contract, lease agreement, or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto . . . .

* * * *

j. (1) Nothing in this chapter shall be construed to require any person to offer any housing accommodations for rent, but housing accommodations already on the rental market may be withdrawn only after prior written approval of the city rent agency, if such withdrawal requires that a tenant be evicted from such accommodations.

New York City Rent and Eviction Regulations, 9 N.Y. Comp. Codes R. & Regs., codified after N.Y. Unconsol. L. § 8597 (McKinney 1987)

§ 2200.12. Withdrawal from rental market

Nothing in these regulations shall be construed to require any person to offer any housing accommodations for rent, but housing accommodations already on the market may be withdrawn only after an order

is issued by the administrator under section 2204.9 of this Title, if such withdrawal requires that a tenant be evicted from such accommodations.

§ 2204.1. Restrictions on removal of tenants, including hotel tenants

(a) No tenant, so long as he continues to pay the rent to which the landlord is entitled, shall be removed from any housing accommodation by action to evict or to recover possession, by exclusion from possession or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that the tenant has no lease or that his lease, or other rental agreement, has expired or otherwise terminated, and notwithstanding any contract, lease agreement or obligation heretofore or hereafter entered into which provides for surrender of possession, or which otherwise provides contrary hereto . . . .

§ 2204.9. Withdrawal of occupied housing accommodations from rental market

(a) A certificate shall be issued where the landlord establishes that he seeks in good faith permanently to withdraw occupied housing accommodations from both the housing and nonhousing markets, without any intent to rent or sell all or any part of the land or structure, and:

> (1) that he requires the entire structure containing the housing accommodations or the land for his own immediate use in connection with a business which, at the time of the filing of the application for a certificate of eviction, he owns and operates in the immediate vicinity of the property in question;
>
> * * * *
>
> or

(4) that the continued operation of the housing accommodations would impose other undue hardship upon the landlord.

New York City Rent Stabilization, N.Y.C. Admin. Code, codified after N.Y. Unconsol. L. § 8617 (McKinney 1987)

§ 26-511. Real state industry stabilization association

c. A code shall not be adopted hereunder unless it appears to the division of housing and community renewal that such code

* * * *

(4) includes provisions requiring owners to grant a one or two year vacancy or renewal lease at the option of the tenant . . .

* * * *

(9) provides that an owner shall not refuse to renew a lease . . . .

§ 26-512. Stabilization provisions

a. No owner of property subject to this law shall charge or collect any rent in excess of the initial legal regulated rent or adjusted initial legal regulated rent until the end of any lease or other rental agreement in effect on the local effective date until such time as a different legal regulated rent shall be authorized pursuant to guidelines adopted by a rent guidelines board.

New York City Rent Stabilization Code, 9 N.Y. Comp. Codes R. & Regs., codified after N.Y. Unconsol. L. § 8634 (McKinney 1987)

§ 2522.5. Lease agreements

(b) Renewal lease.

(1) For housing accommodations other than hotels, upon such notice as is required by sec-

tion 2523.5 of this Title (Notice for Renewal of Lease and Renewal Procedure), the tenant shall have the right of selecting at his or her option a renewal of his or her lease for a one or two year term . . . .

The owner shall furnish to the tenant signing a renewal lease from pursuant to section 2523.5 of this Title, a copy of the fully executed renewal lease form, bearing the signatures of the owner and tenant, and the beginning and ending dates of the lease term, within 30 days from the owner's receipt of the renewal lease form signed by the tenant. Such renewal lease form shall conform to the intent of section 5-702 of the General Obligations Law.

(2) Upon complaint by the tenant that he or she was not served with a copy of the fully executed . . . renewal lease . . . the DHCR shall order the owner to furnish the copy of the . . . renewal lease form. In addition to any other penalties provided under this Code, noncompliance by the owner within 20 days of such order shall result in the denial of any rent guideline increases for . . . renewal leases until the fully executed copy of the . . . renewal lease form is furnished by the owner of the tenant.

§ 2524.1. Restrictions on removal of tenant

(a) As long as the tenant continues to pay the rent to which the owner is entitled, no tenant shall be denied a renewal lease or be removed from any housing accommodation by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession . . .

§ 2524.4. Grounds for refusal to renew lease, or in hotels, discontinuing a hotel tenancy, without order of the DHCR

The owner shall not be required to offer a renewal lease to a tenant, or in hotels, to continue a hotel tenancy, and may commence an action or proceeding to recover possession in a court of competent jurisdiction, upon the expiration of the existing lease term, if any, after serving the tenant with a notice as required pursuant to section 2524.2 of this Part (Termination Notices) only on one or more of the following grounds:

(a) Occupancy by owner or member of owner's immediate family.

(1) An owner who seeks to recover possession of a housing accommodation for such owner's personal use and occupancy as his or her primary residence in the City of New York and/or for the use and occupancy of a member of his or her immediate family as his or her primary residence in the City of New York, except that tenants in a non-eviction conversion plan pursuant to section 352-eeee of the General Business Law may not be evicted on this ground on or after the date the conversion plan is declared effective.

§ 2524.5. Grounds for refusal to renew lease or discontinue hotel tenancy and evict which require approval of the DHCR

(a) The owner shall not be required to offer a renewal lease to a tenant . . . upon any one of the following grounds:

(1) Withdrawal from the rental market.

The owner has established to the satisfaction of the DHCR after a hearing, that he or she seeks in good faith to withdraw any or all hous-

ing accommodations from both the housing and non-housing rental market without any intent to rent or sell all or any part of the land or structure and:

(i) that he or she requires all or part of the housing accommodations or the land for his or her own use in connection with a business which he or she owns and operates.